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## **The Quasi Government: Hybrid Organizations with Both Government and Private Sector Legal Characteristics**

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# The Quasi Government: Hybrid Organizations with Both Government and Private Sector Legal Characteristics

## Summary

This report provides an overview of federally related entities that possess legal characteristics of both the governmental and private sectors. These hybrid organizations (e.g., Fannie Mae, National Park Foundation, In-Q-Tel), collectively referred to in this report as the “quasi government,” have grown in number, size, and importance in recent decades.

A brief review of executive branch organizational history is followed by a description of entities with ties to the executive branch, although they are not “agencies” of the United States as defined in Title 5 of the *U.S. Code*. Several categories of quasi governmental entities are defined and discussed: (1) quasi official agencies; (2) government-sponsored enterprises (GSE); (3) federally funded research and development corporations; (4) agency-related nonprofit organizations; (5) venture capital funds; (6) congressionally chartered nonprofit organizations; and (7) instrumentalities of indeterminate character.

The quasi government, not surprisingly, is a controversial subject. To supporters of this trend toward greater reliance upon hybrid organizations, the proper objective of governmental management is to maximize performance and results, however defined. In their view, the private and governmental sectors are alike in their essentials, and thus subject to the same economically derived behavioral norms. They tend to welcome this trend toward greater use of quasi governmental entities.

Critics of the quasi government, on the other hand, tend to view hybrid organizations as contributing to a weakened capacity of government to perform its fundamental constitutional duties, and to an erosion in political accountability, a crucial element in democratic governance. They tend to consider the governmental and private sectors as being legally distinct, with relatively little overlap in behavioral norms.

Congress is increasingly engaged with the quasi government. The issues run the gamut from enacting legislation to encourage the creation of nonprofit organizations to promote individual national parks, to proposals to strengthen regulation of government-sponsored enterprises such as Fannie Mae, to oversight hearings respecting national security issues at Los Alamos Laboratory. There is nothing modest about the size, scope, and impact of the quasi government.

Time will tell whether the emergence of the quasi government is to be viewed as a symptom of decline in our democratic government, or a harbinger of a new, creative management era where the purported artificial barriers between the governmental and private sectors are breached as a matter of principle.

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# The Quasi Government: Hybrid Organizations with Both Government and Private Sector Legal Characteristics

## Context

In recent years, both Congress and the President have increasingly used hybrid organizations for the implementation of public policy functions traditionally assigned to executive departments and agencies. Instead, their preference has often been to assign administrative responsibilities to newly created independent agencies or to hybrid organizations possessing legal characteristics of both the governmental and private sectors. With respect to the latter, hybrid organizations, it is not surprising that their use tends to generate considerable support and criticism. There are today, associated with the federal government alone, literally hundreds of hybrid entities that have collectively been called the “quasi government.”<sup>1</sup> The relationship of this burgeoning quasi government to elected and appointed officials is a subject of growing concern, as it touches the very heart of democratic governance: to whom are these hybrids accountable, and how is the public interest being protected over and against the interest of private parties?

The scope and consequences of these hybrid organizations have not been extensively studied. Basic definitional issues resist resolution. Even the language to be used in discussing the quasi government is in dispute. Should government management be discussed in the language of law, of economic theory, or of the business school? The traditional tools for holding executive agencies accountable, such as the budget and general management laws, are inapplicable in most instances, often leaving these hybrids with the freedom to pursue their own institutional interests, which may or may not conform to the public interest as defined by the nation’s elected leadership.

The current popularity of the quasi government option can be traced to at least four major factors at work in the political realm:

- (1) the current controls on the federal budget process that encourage agencies to develop new sources of revenues;
- (2) the desire by advocates of agencies and programs to be exempt from central management laws, especially statutory ceilings on personnel and compensation;

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<sup>1</sup> Harold Seidman, “The Quasi World of the Federal Government,” *The Brookings Review*, vol. 2, Summer 1988, pp. 23-27.

- (3) the contemporary appeal of generic, economic-focused values as the basis for a “new public management;” and
- (4) the belief that management flexibility requires entity-specific laws and regulations, even at the cost of less accountability to representative institutions.

This report introduces the reader to the quasi government, suggests categories of entities within this sector, and examines their legal characteristics, behavior, and possible policy consequences. The report will be revised and updated as new information and analyses become available.

## In Search of a Definition

The quasi government, virtually by its name alone and the intentional blurring of the governmental and private sectors, is not easily defined. In general, the term is used in two ways: to refer to entities that have some legal relation or association, however tenuous, to the federal government; or to the terrain that putatively exists between the governmental and private sectors. For the most part, this report will use the term quasi government in the former context, referring to entities with some legal relationship to the federal government. The one common characteristic to this melange of entities in the quasi government is that they are *not* agencies of the United States as that term is defined in Title 5 of the *U.S. Code*.

If a quasi governmental entity is not an agency of government, what is it? For this report’s purposes, it is a hybrid organization that has been assigned by law, or by general practice, some of the legal characteristics of both the governmental and private sectors. While different categories of quasi governmental organizations can be described and found useful as an analytic tool, such categories are artificial, with porous lines of distinction and differentiation, and tend to be imposed upon the disparate entities after the fact.

## Spectrum or Categories

Two rough models suggest themselves as ways of looking at these entities.

First, there is the linear spectrum model where the existence of a quasi government between the governmental and private sectors is designated and categories of organizations (e.g., government-sponsored enterprises) and their relationship to the executive branch (and Congress) are described on a descending scale from closest to the most distant.

Second, there is the categoric organization model involving, in this instance, the suggestion of four categories: pure government organization; quasi governmental organization (“quago”); quasi nongovernmental organization (“quango”); and pure private. A quago is essentially a government organization that is assigned some, or many, of the attributes normally associated with the private sector. A quango, on the other hand, is essentially a private organization that is assigned some, or many, of the

attributes normally associated with the governmental sector.<sup>2</sup> Under this schema, the Legal Services Corporation, for example, would be a quango, while the Red Cross would be a quango.

Whatever the value of the quango/quango designations, especially in the comparative international literature on corporate organizations, it shall not be used here. This report follows the lineal spectrum approach in describing the elements within the quasi government. It is possible to begin with what are referred to in the *U.S. Government Manual* as “Quasi Official Agencies,” those entities, arguably, closest to the executive branch, and move on to the other end of the spectrum, “congressionally chartered nonprofit organizations,” those entities, arguably, the furthest from the executive branch.

## **Federal Organization and Management: The Traditional View Under Question**

It was the intent of the framers of the Constitution that the authority and organization of the executive branch be as much as possible unified under the President, and that Congress be the source to which accountability was rendered. This theoretical proposition was put into practice when the first Congress convened in 1789. One of the first orders of business was the establishment of executive departments. Three “organic” statutes were enacted creating three “great” departments; Treasury, State and War.<sup>3</sup> The heads of these departments were directly responsible to the President and were his agents (and thus the agency chiefs were removable by him), but accountable for policy purposes to Congress. All the particular functions of the newly created executive branch, save that of delivering the mails, were entrusted to these departments.

With respect to fundamental authorities and lines of accountability, however, the executive branch has never been a pristine unity. From the decision in the first Congress to give the comptroller in the Department of the Treasury a substantial

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<sup>2</sup> There is a burgeoning comparative international literature on the quasi government as it functions today in various countries. In many instances, the literature stresses the problems raised by these bodies for democratic theory. Organization for Economic Cooperation and Development (OECD), *Distributed Public Governance: Agencies, Authorities and Other Government Bodies* (Paris: OECD, 2002). Matthew Flinders and M.J. Smith, eds., *Quango, Accountability and Reform: The Politics of the Quasi Government* (London: Macmillan, 1999). S. Weir, “Quangos: Questions of Democratic Accountability,” in F. Ridley and D. Wilson, eds., *The Quango Debate* (London: Oxford University Press, 1995), pp. 128-145. Jonathan G.S. Koppell, *The Politics of Quasi Government: Hybrid Organizations and the Control of Public Policy* (New York: Cambridge University Press, 2003).

<sup>3</sup> Discussion of the acts creating the three “great departments” may be found in James Hart, *The American Presidency in Action, 1789: A Study in Constitutional History* (New York: Macmillan, 1948), chapter 7. See also: Leonard D. White, *The Federalists: A Study in Administrative History* (New York: Macmillan, 1948).

degree of legal autonomy within the department,<sup>4</sup> down to the more recent “independent counsels” functioning in an uneasy relationship with the executive branch,<sup>5</sup> not all officers have been directly accountable to the President.<sup>6</sup> These exceptions notwithstanding, the prevailing organizational norm has historically been toward an executive accountable to the President.<sup>7</sup>

Reinforcing the hierarchical concept of the accountable executive has been the view that authority ought to be assigned by delegation from the President or department heads to subordinate officers, rather than being assigned directly by Congress to a nondepartment head.<sup>8</sup> The first substantial breaks with the concept of a unitary executive did not occur until the creation of the Civil Service Commission in 1883 and the Interstate Commerce Commission in 1887. Subsequently, more independent regulatory commissions would be added. In the 20th century, an increasing number of “independent” agencies were established, the term “independent” meaning in this instance, an agency not in a department (e.g., Tennessee Valley Authority; National Aeronautic and Space Administration). Nonetheless, the independent agencies generally remained full government agencies operating under all the general management laws,<sup>9</sup> except where exempted.

The view that all government activities should be accountable in some manner to politically responsible officials received its most forceful iteration in the 20th century in the Hoover Commission report of 1949: “[The] organization and administration of the Government ... must establish a clear line of control from the

<sup>4</sup> 1 *Annals of Congress* (1789), p. 614.

<sup>5</sup> The federal law governing the appointment of independent counsels expired June 30, 1999. CRS Report RL31246, *Independent Counsel Law Expiration and the Appointment of ‘Special Counsels,’* by Jack Maskell. See also Katy J. Harriger, “Separation of Powers and the Politics of Independent Counsels,” *Political Science Quarterly*, vol. 109, Summer 1994, pp. 261-86. Louis Fisher, “The Independent Counsel Statute,” in *The Clinton Scandal and the Future of American Government*, eds., Mark Rozell and Clyde Wilcox (Washington: Georgetown University Press, 2000), pp. 60-80.

<sup>6</sup> Charles Tiefer, “The Constitutionality of Independent Officers as Checks on Abuses of Executive Power,” *Boston University Law Review*, vol. 63, 1983, pp. 59-103.

<sup>7</sup> Peri E. Arnold, *Making the Managerial Presidency: Comprehensive Reorganization Planning, 1905-1996*, 2<sup>nd</sup> ed. (Lawrence, KS: University Press of Kansas, 1999). Ronald C. Moe, *Administrative Renewal: Reorganization Commissions in the 20<sup>th</sup> Century* (Lanham, MD: University Press of America, 2003).

<sup>8</sup> In the administration of James Monroe (1817-1825), the President objected to a proposal to establish the Patent Office as an agency independent of any executive department. He argued that such a proposal would result in a usurpation of his powers as President. “I have always thought that every institution of whatever nature soever it might be, ought to be comprised within some one of the Departments of the Government, the chief of which only should be responsible to the Chief Executive magistrate of the Nation. The establishment of inferior independent departments, the heads of which are not, and ought not be, members of the administration, appears to me to be liable to many serious objections, which will doubtless occur to you.” (2 *American State Papers*, Mis., p. 192).

<sup>9</sup> CRS Report RL30795, *General Management Laws: A Compendium*, Clinton Brass, coordinator.



President to these department and agency heads and from them to their subordinates with correlative responsibility from these officials to the President, cutting through the barriers which in many cases made bureaus and agencies partially independent of the Chief Executive.”<sup>10</sup>

Through the 1950s the organization and management of the executive branch generally followed some basic rules. If an entity was established by Congress to accomplish a public purpose, the probability was that it was an agency of the United States operating under the general management laws enforced by the President. These values, originating with the founding fathers, as reinterpreted by the Progressives, featured the centrality of public law, departmental integration and political accountability. The President was viewed as the Chief Manager of the administrative system.<sup>11</sup> The governmental and private sectors cooperated, but were kept legally distinct in the interests of protecting citizens’ rights against a potentially arbitrary government.

These values began to be questioned in the 1960s as evidenced in the establishment of the Communications Satellite Corporation (ComSat) in 1962. Congress, in this instance, created a private, for-profit corporation indicating a more flexible attitude towards organizational innovation. Additional organizations appeared that were intentionally mixed in their legal characteristics. The term “quasi governmental” began to appear in legislation, and unusual structures would be constructed to promote “flexibility,” even when flexibility sometimes resulted in less accountability. This was one of the arguments made for creating the Corporation for Public Broadcasting (81 Stat. 365; 47 U.S.C. 396).<sup>12</sup> Other factors began to further erode the unitary executive model, such as greater dependence upon third parties, usually private contractors, for the performance of governmental functions.<sup>13</sup> The number of full-time civil servants in the federal government as a percentage of the workforce began what was to become a substantial decline, a decline accelerated in recent years.<sup>14</sup>

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<sup>10</sup> U.S. Commission on Organization of the Executive Branch of the Government, *The Hoover Commission Report* (New York: McGraw-Hill Book Company, 1949), p. 7.

<sup>11</sup> Ronald C. Moe, “At Risk: The President’s Role as Chief Manager,” in *The Managerial Presidency*, 2<sup>nd</sup> ed., ed. James Pfiffner (College Station, TX: Texas A&M Press, 1999), pp. 265-84.

<sup>12</sup> Robert K. Avery and Robert Pepper, “An Institutional History of Public Broadcasting,” *Journal of Communications*, vol. 30, Summer 1980, pp. 126-38.

<sup>13</sup> Donald F. Kettl, “Managing Indirect Government,” in Lester M. Salamon, ed., *The Tools of Government: A Guide to the New Governance* (New York: Oxford University Press, 2002), pp. 490-511.

<sup>14</sup> In 1970, federal civilian employment was 2,997,000, or 3.8 percent of the U.S. employment total. By 2003, federal civilian employment had been reduced to 2,743,000, or 2 percent of the U.S. employment total. U.S. Bureau of the Census, *Statistical Abstract of the United States* (Washington: GPO, 2004), p. 321. For discussion of the meaning and consequences of these statistics, as well as the corresponding growth in contract employees working for the federal government, see Paul Light, *The True Size of Government* (Washington: The Brookings Institution, 1999).

In the late 1980s, the concept of legally distinctive governmental and private sectors began to be seriously questioned.<sup>15</sup> In its place a “new public management” concept emerged that argued that the governmental and private sectors were essentially alike and subject to the same, economic based, behavioral norms and practices. Internationally, the New Public Management (NPM)<sup>16</sup> movement, coupled with the movement toward privatization of governmental agencies and programs, became the reigning orthodoxy. Many elements of NPM were to be found in Vice President Al Gore’s National Performance Review (NPR)<sup>17</sup> which sought to “reinvent” some executive branch units and create corporate style, entrepreneurial structures.<sup>18</sup>

The purported, and often realized, strength of entrepreneurial management lies in the flexibility it provides managers to improve the performance of their agencies. Performance in the entrepreneurial context, is usually measured in “output” or “results” terms, rather than in conformance to process regulations. Hence, risk-taking by managers to achieve improved performance is to some degree accepted and encouraged. The evidence thus far available suggests that the new, entrepreneurial management has resulted in improved management in many executive agencies. On the other hand, simply improving performance, as was the case with the Internal Revenue Service in the early 1990s, has occasionally proven politically counterproductive to the agency if the improved performance (in this case increased tax collections) came at the apparent expense of other values, such as due process of

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<sup>15</sup> See, for example: Barry Bozeman, *All Organizations Are Public: Bridging Public and Private Organizational Theories* (San Francisco: Jossey-Boss, 1987); Robert D. Behn, *Rethinking Democratic Accountability* (Washington: Brookings Institution, 2001); Ronald C. Moe, “The Emerging Federal Quasi Government: Issues of Management and Accountability,” *Public Administration Review*, vol. 61, May/June 2001, pp. 290-312.

<sup>16</sup> The term “New Public Management” (NPM) gained currency in part through its use by the Organization for Economic Cooperation and Development (OECD) to refer to the literature, propositions, and practices promoting conceptual convergence of the governmental and private sector management. OECD, *Governance in Transition: Public Management Reforms in OECD Countries* (Paris: OECD, 1995); Larry Terry, “Administrative Leadership, Neo-Managerialism, and the Public Management Movement,” *Public Administration Review*, vol. 58, May/June 1998, pp. 194-200.

<sup>17</sup> The term National Performance Review (NPR) refers both to a report and to an organization. In 1993, under Vice President Al Gore’s leadership, the NPR issued a report titled: *From Red Tape to Results: Creating a Government That Works Better and Costs Less* (Washington: GPO, 1993). The NPR, a nonstatutory organization, continued to issue reports through 1997 (e.g., *Businesslike Government: Lessons Learned from America’s Best Companies*, 1997). In 1998, the NPR organization changed its name to the National Partnership for Reinventing Government. For a critical overview of the “reinventing government” exercise, see Michael E. Norris, *Reinventing the Administrative State* (Lanham, MD: University Press of America, 2000).

<sup>18</sup> “Public entrepreneurship is a management approach developed by the reinventing government movement.... The transformation of existing, outdated bureaucratic organizations into agile, anticipatory, problem-solving entities is what reinventionists call ‘entrepreneurial government.’” Steven Cohen and William Eimicke, “Is Public Entrepreneurship Ethical? A Second Look at Theory and Practice,” *Public Integrity*, vol. 1, Winter 1999, p. 55.

law. The rapid ascendancy of these “new” values in the United States has not been without challenge<sup>19</sup> and has had consequences with respect to the quasi government, as will be discussed more fully later in the report.

## Quasi Governmental Organizations

### Quasi Official Agencies

Within the quasi government, it is possible to begin with those entities that are, arguably, closest to the executive branch. The *United States Government Manual, 2004-2005*, contains a section titled; “Quasi Official Agencies,” listing some four entities: Legal Services Corporation; the Smithsonian Institution; State Justice Institute; and the United States Institute of Peace. In prior years, other entities have been accorded this designation, e.g., National Railroad Passenger Corporation (AMTRAK); National Consumer Cooperative Bank; and National Academy of Sciences. The category is something of a “catchall” designation to include entities the National Archives and Records Administration (NARA), compilers of the *Manual*, find difficult to comfortably fit elsewhere. Insofar as NARA provides a defining characteristic for quasi official agencies, it is that they “are not agencies under the definition of 5 U.S.C. 105 but are required by statute to publish certain information on their programs and activities in the *Federal Register*,” also published by NARA.<sup>20</sup>

The problems associated with quasi official agencies tend to be related to their legal status, as defined by the agencies themselves, at any particular moment and with the particular subject under discussion. For example, the Smithsonian Institution, from its inception a hybrid will assert its “privateness,” or its governmental associations, depending upon which status appears to advance its particular objective of the moment.

Quasi official agencies, like other elements of the quasi government, may exist in what has been called “the twilight zone” between the governmental and private sectors.<sup>21</sup> This status, while presumably permitting considerable autonomy from

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<sup>19</sup> The debate between those supporting the entrepreneurial government management paradigm and those supporting a public law management paradigm occupies a good deal of the current public management literature. See, for example: David Osborne and Ted Gaebler, *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector from Schoolhouse to State House, City Hall to the Pentagon* (Reading, MA: Addison Wesley, 1992); H. George Frederickson, *The Spirit of Public Administration* (San Francisco: Jossey-Bass, 1997); and Ronald C. Moe, “The Importance of Public Law: New and Old Paradigms of Government Management,” in Phillip J. Cooper and Chester A. Newland, eds., *Handbook of Public Law and Administration* (San Francisco: Jossey-Bass, 1997), 41-57.

<sup>20</sup> U.S. Office of the Federal Register, National Archives and Records Administration, *United States Government Manual, 2004-2005* (Washington: GPO, 2004), p. 561.

<sup>21</sup> Harold Seidman, *Politics, Position and Power: the Dynamics of Federal Organization*, (continued...)

regular lines of accountability to managerial agencies, including the General Accounting Office, is not, as is often argued in their defense, protection from “political influences.” Quasi official agencies, like other forms of quasi governmental institutions, may sometimes be highly “political,” and subject to pressures not dissimilar to that encountered by regular executive agencies.<sup>22</sup>

## Government-Sponsored Enterprises

Distinctions between the governmental and private sectors are especially blurred with respect to a category of organization known as “government-sponsored enterprises” (GSE). There is no established criteria defining standards to be met prior to the establishment of a GSE, nor is there a listing of GSEs in the U.S. Code. Each GSE is created *sui generis* with its attributes defined by Congress in its enabling legislation. The absence of a legal definition of a GSE does not, however, preclude the development of a practical definition. For purposes of this report, a GSE “is a privately owned, federally chartered financial institution with nationwide scope and spending powers that benefits from an implicit federal guarantee to enhance its ability to borrow money.”<sup>23</sup>

Historically, the federal government has been involved in few commercial enterprises on an equity basis. There were some early instances of the federal government participating in otherwise private corporate enterprises on a shared ownership basis, most notably the first and second Bank of the United States.<sup>24</sup> This practice came into question, however, as a consequence of a Supreme Court ruling

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<sup>21</sup> (...continued)

<sup>2nd</sup> ed. (Oxford University Press, 1975), ch. 9.

<sup>22</sup> One argument often made when proposing independence, autonomy, or quasi governmental status for an agency is that such a move will result in less political and interest group pressures being brought to bear on the agency. That such an assertion is often not the case is illustrated by a study of the Social Security Administration (SSA), recently made independent of the Department of Health and Human Services (HHS). “Few if any putative benefits from reorganization have been realized by the SSA. Removing the agency from HHS has meant, of course, independence from the agency’s policy tendencies, but it has left the SSA more exposed to its various clientele or constituency groups and to congressional and executive branch politics of divided government.” David G. Smith, “Organizational Models for Restructuring Fee-for-Service Medicare,” in Robert D. Reischauer, Stuart Butler, and Judith Lave, eds., *Medicare: Preparing for the Challenges of the 21<sup>st</sup> Century* (Washington: National Academy of Social Insurance, 1998), p. 230. Also: J.L. Mashaw, “Reinventing Government and Regulatory Reform, Studies in the Neglect and Abuse of Administrative Law,” *University of Pittsburgh Law Review*, vol. 57, (1996): 405-22.

<sup>23</sup> Ronald C. Moe and Thomas H. Stanton, “Government-Sponsored Enterprises as Federal Instrumentalities: Reconciling Private Management with Public Accountability,” *Public Administration Review*, vol. 49, July/Aug. 1989, p. 321. See also CRS Report RS21663, *Government Sponsored Enterprises: An Institutional Overview*, by Kevin R. Kosar.

<sup>24</sup> Bray Hammond, *Banks and Politics in America From the Revolution to the Civil War* (Princeton, NJ: Princeton University Press, 1957); John T. Holdsworth and David Dewey, *The First and Second Banks of the United States*, S. Doc. 571, 61<sup>st</sup> Cong., 2<sup>nd</sup> sess. (Washington: GPO, 1910); Leonard D. White, *The Jacksonians* (New York: Macmillan, 1954), chapter 24.

in 1819.<sup>25</sup> From that time to the present, the federal government, with few exceptions, has consciously avoided shared ownership involvement with private, nongovernmental entities. This doctrine of equity separation contributed to the attractiveness of the GSE option.

Congress created GSEs generally to help make credit more readily available to sectors of the economy believed to be disadvantaged in the credit markets.<sup>26</sup> There are presently five GSEs, properly defined.<sup>27</sup> Three of the GSEs — Federal National Mortgage Association (Fannie Mae), Federal Home Loan Mortgage Corporation (Freddie Mac), and the Federal Agricultural Mortgage Corporation (Farmer Mac) — are investor owned; others — the Federal Home Loan Bank System and the Farm Credit System — are owned cooperatively by their borrowers. In addition, two institutions — the Financing Corporation and the Resolution Funding Corporation — are governmental bodies that were given GSE status so that their funding would not appear to be federal borrowing for purposes of the federal budget. Finally, one well-known GSE, Sallie Mae (Student Loan Marketing Association), has recently shed its GSE status and become a wholly private firm.<sup>28</sup>

Defenders of the current GSEs and the economic concepts upon which they are based argue that GSEs continue to meet a national need that would not otherwise be met or be met poorly by corporations fully in the private sector. Further, they contend that the current GSEs are well managed, financially sound, and assist less-advantaged mortgage borrowers. They maintain that the subsidy retained from the presence of the federal implied guarantee of GSE obligations is passed on to the consumer in the form of lower mortgage rates. Fannie Mae, in its national advertising campaign, suggests that its special GSE status is worth a quarter of a percent in mortgage interest and thus 400,000 families are provided mortgages that would not otherwise be qualified to do so. “At Fannie Mae, we have one job. One

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<sup>25</sup> *McCulloch v. Maryland* (17 U.S. (4 Wheat.) 315, (1819)). The Supreme Court’s ruling implied that partial federal ownership of a corporation, in this instance the Bank of the United States, assigned the corporation certain attributes normally reserved to the sovereign authority (e.g., non-taxable status in the several states). See also: *Osborn v. Bank of the United States* (17 U.S. (4 Wheat.) 738, (1824)).

<sup>26</sup> Thomas H. Stanton, *Government Sponsored Enterprises: Mercantilist Companies in the Modern World* (Washington: AEI, 2002); also: *A State of Risk: Will Government-Sponsored Enterprises be the Next Financial Crisis?* (New York: HarperBusiness, 1991).

<sup>27</sup> There are two additional GSEs, technically speaking — the Financing Corporation and the Resolution Funding Corporation — but they are funding shells, not operating corporations. They were given GSE status so that their funding would not appear to be federal borrowing for purposes of the federal budget. The Student Loan Marketing Association (Sallie Mae) was not included in the list because it is well along in the process of shedding its GSE status and designation and will be the entirely private SLM Corporation by 2006. J. Kevin Corder and Susan M. Hoffman, “Privatizing Federal Credit Programs: Why Sallie Mae?” *Public Administration Review*, vol. 64, March/April 2004, pp. 180-191.

<sup>28</sup> J. E. Dean, S. L. Moskowitz, and K. L. Cipriani, “Implications of Privatization of Sallie Mae,” *Journal of Public Budgeting, Accounting and Financial Management*, vol. 11, Spring 1999, pp. 56-80.

mission. One purpose. To do whatever we can to lower the cost of home ownership.”<sup>29</sup>

Contemporary GSEs are part of a tradition of mercantilist financial institutions in that the government assigns them benefits and privileges in their charters that are not available to fully private corporations.<sup>30</sup> In return, the government is able to limit the activities and lines of business of GSEs and require them to promote selected public policy objectives. The present GSEs are traceable in concept to several enterprises created during the Great Depression.<sup>31</sup> GSEs provide financial services such as issuing capital stock and short and long term debt instruments, guaranteeing mortgage-backed securities (MBS), purchasing loans and holding them in their own portfolio, funding activities (e.g., subsidized mortgages in selected areas), and collecting fees for guarantees and other services.<sup>32</sup>

While the details may vary from one instance to the next, Congress provides that GSEs typically have four characteristics:

- private ownership;
- implicit federal guarantee of obligations;
- activities limited by congressional charter;
- limited competition.

The economic rationale for GSEs is the belief that without such a government sponsored institution, a critical area of necessary debt financing would go unserved, or would be serviced at an expensive or inefficient level. Government, according to this rationale, should use some of its sovereign powers (e.g., full faith and credit of the U.S. Treasury) to encourage the development of private financial intermediaries to serve selected markets. In terms of meeting their original congressional objective, that was to liquify the mortgage credit markets on a national rather than regional or state basis, the GSEs have been remarkably successful. But with this success have come reservations and questions.

There is nothing modest about the size and scope of GSEs. Due to the implicit federal backing for their notes,<sup>33</sup> GSEs have become some of the largest financial

<sup>29</sup> Fannie Mae advertisement, *Washington Post*, May 11, 1999, p. A4.

<sup>30</sup> Thomas H. Stanton, “Nonquantifiable Risks and Financial Institutions: The Mercantilist Legal Framework of Banks, Thrifts, and Government-Sponsored Enterprises,” in Charles A. Stone and Anne Zissu, eds., *Global Risk-Based Capital Regulations* (Burr Ridge, IL: Irwin Professional Publishing, 1994), vol. 1, pp. 57-97.

<sup>31</sup> The Farm Credit Banks, however, pre-date the Depression, having been established in 1916. (39 Stat. 360).

<sup>32</sup> U.S. General Accounting Office, *Financial Services Institutions: Information for Assessing the Government’s Potential Financial Exposure*, GAO/GGD-98-125, (Washington: GAO, 1998), p. 3.

<sup>33</sup> There is no explicit guarantee in law for GSE liabilities. Whether correct or not, the specific liabilities incurred by GSEs are considered by the market as contingent or potential (continued...)

institutions in the United States. The combined debt outstanding of Fannie Mae and Freddie Mac is approximately \$1.4 trillion. The Federal Home Loan Bank System has \$710 billion in consolidated debt outstanding.<sup>34</sup> Implicit or market-inferred federal backing helps GSEs to grow rapidly. On the average, the combined size of the Fannie Mae and Freddie Mac has more than doubled every five years between 1968 and 2002.<sup>35</sup>

Two issues stand out when discussing the finances of GSEs; safety and soundness, and the utility and accountability resulting from their status as a government instrumentality. GSEs primarily act as financial intermediaries to assist borrowers in housing, education, and agriculture. Although they are privately owned, they benefit financially from government sponsorship. Their securities can collateralize public deposits (e.g., Social Security Administration deposits), and can be held in unlimited amounts by most banks and thrifts. They are not subject, with one exception (Farmer Mac), to Securities and Exchange Commission (SEC) registration,<sup>36</sup> and their corporate earnings are exempt from state and local income taxes, the latter practice attracting particular controversy.<sup>37</sup> They may borrow virtually unlimited amounts of money in the federal agency credit market on favorable terms and up to \$2.25 billion from the Treasury, at the latter's discretion. Most importantly, the credit market perceives that this federal sponsorship results in an implied federal guarantee of their corporate debt and obligations. These factors enable GSEs to borrow monies at a significantly lower interest rate than competitors. Reviewing these special privileges (subsidies), it is not surprising that some argue that GSEs grow rapidly at the expense of would-be competitors.<sup>38</sup>

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<sup>33</sup> (...continued)

liabilities of the federal government. There is a general presumption that the federal government would not let the GSEs fail and declare bankruptcy. This implied or market-inferred guarantee is similar to reinsurance; it is also the critical element determining the behavior of the GSE management and of the market attitude toward GSEs.

<sup>34</sup> Figures provided by the Office of Federal Housing Oversight, available at [<http://www.ofheo.gov/media/pdf/draftsp81103.pdf>], visited Oct. 10, 2003.

<sup>35</sup> Stanton, *Government Sponsored Enterprises: Mercantilist Companies in the Modern World*, p. 8. For a critical views of Fannie Mae and Freddie Mac generally, see Peter J. Wallison, *Serving Two Masters, Yet Out of Control: Fannie Mae and Freddie Mac* (Washington AEI, 2002).

<sup>36</sup> In July 2002, Fannie Mae and Freddie Mac announced they would voluntarily register their common stock with the SEC. CRS Report RS2163, *Fannie Mae, Freddie Mac, and the SEC Registration and Disclosures*, by Mark Jickling and Barbara Miles.

<sup>37</sup> CRS Report 95-952E, *Unfunded Mandates and State Taxation of the Income of Fannie Mae, Freddie Mac, and Sallie Mae: Implications for D.C. Finances*, by Dennis Zimmerman .

<sup>38</sup> U.S. Congressional Budget Office, *Assessing the Public Costs and Benefits of Fannie Mae and Freddie Mac*, (Washington: CBO, 1996), p. xii. The value of the subsidy has been a source of intense debate between the GSEs and their overseers. The CBO reported that the subsidy was worth \$23 billion in 2003, up almost 70 percent from \$13.6 billion in 2000. With respect to Fannie Mae and Freddie Mac, CBO estimated that they retained \$6.2 billion of the perceived subsidy while \$13.6 billion was passed along to borrowers in the form of  
(continued...)

Despite their successes, GSEs have faced operational tumults. In 1988, the federal government thought it prudent to authorize \$8 billion of financial assistance for one insolvent GSE, the Farm Credit System. Also, Fannie Mae was in trouble in the early 1980s, when its capitalization dropped until the corporation had a negative net worth of \$11 billion. These instances, plus the sheer size and growth of a putative unfunded liability upon the Treasury, has prompted some to be concerned about the risks GSEs pose to the political as well as economic system. As early as 1991, Thomas Stanton voiced the opinion that:

Such huge institutions represent an uncomfortable concentration of risk. If anything happens to management quality or prudence (for example, if Fannie Mae is again tempted to play the interest-rate yield curve or if a lower-quality management team took control of one of the enterprises), the financial consequences could rival those of the thrift industry. The federal government is clearly better protected if it diversifies this kind of risk.<sup>39</sup>

GSEs also have been accused of mission creep. GAO questioned the housing GSEs for moving into nonmortgage investment programs.<sup>40</sup>

In recent years, both Congress and the housing GSE regulator (the Office of Federal Housing Enterprise Oversight (OFHEO) in the Department of Housing and Urban Affairs) have expressed concern respecting the size, the systemic risk to the nation's financial system, and the accounting practices of the GSEs.<sup>41</sup> Concern over the condition of the housing GSEs was heightened in 2003 and 2004 when significant accounting irregularities were discovered at both Freddie Mac and Fannie Mae. Both companies had to restate their earnings.<sup>42</sup> In response, the 108<sup>th</sup> and 109<sup>th</sup> Congresses both have held hearings and considered legislation that would fundamentally alter the regulations and regulatory agencies for overseeing GSEs.<sup>43</sup>

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<sup>38</sup> (...continued)

lower mortgage costs. Congressional Budget Office, *Updated Estimate of the Subsidies of the Housing GSEs* (Washington, CBO: April 2004).

<sup>39</sup> Stanton, *A State of Risk*, p. 196.

<sup>40</sup> U.S. General Accounting Office, *Federal Oversight Needed in Nonmortgage Investments*, GAO/GGD-98-48 (Washington: GAO, 1998). A number of critics believe that GSEs have accomplished their original purpose to rectify imperfections in the secondary mortgage market and are no longer necessary or desirable. These individuals tend to advocate privatizing the GSEs and allowing them to compete against private firms. For example, see Peter J. Wallison et. al., *Privatizing Fannie Mae, Freddie Mac, and the Federal Home Loan Banks: How and Why* (Washington: The AEI Press, 2004).

<sup>41</sup> CRS Report RL32069, *Improving the Effectiveness of GSE Oversight: Legislative Proposals* by Loretta Nott and Mark Jickling; and CRS Report RL32795, *Government-Sponsored Enterprises: Regulatory Reform Legislation*, by Mark Jickling, pp. 2-3.

<sup>42</sup> CRS Report RS1567, *Accounting and Management Problems at Freddie Mac*, by Mark Jickling; and CRS Report RS21949, *Accounting Problems at Fannie Mae*, by Mark Jickling.

<sup>43</sup> In testimony before the Senate Banking Committee, Federal Reserve Board Chairman Alan Greenspan, noted a paradox facing Congress in "fixing" the regulatory apparatus for GSEs. "[W]orld-class regulation, by itself, may even worsen the situation if market (continued...)



The political accountability issues raised by GSEs' hybrid character resist generalization. GSEs are instrumentalities, not agencies, of the United States and this distinction is both legally and administratively important. The federal government's control over an institution differs significantly depending upon whether that institution is an agency or instrumentality.

An agency (as defined in Title 5) is managed directly through the federal management hierarchy. As a general rule, an agency is subject to all general management laws and regulations provided in the U.S. Code unless exempted from such coverage in either its enabling statute, or by virtue of being part of an exempted class of agency. Thus, an agency is subject to federal appointment of its senior officers (often requiring Senate confirmation), to civil service and federal procurement laws, and to the federal budget and other direct federal management controls, unless exempted.

An instrumentality of government, on the other hand, is a privately-owned institution not subject to any of the general management laws and regulation unless so indicated in its enabling legislation (charter). An instrumentality is assigned in its charter limited prerogatives (e.g., immunity from state taxation) normally associated with the government's sovereign authority. In return for this limited assignment of governmental powers, an instrumentality cannot on its own authority alter the charter or conduct activities contrary to the intent of the charter. A GSE is supervised but not directly managed by the federal government.

Primary accountability of GSE management is not to the federal government, or to the borrowers, but to the corporation's shareholders. Investors come first. As Sallie Mae's then-Chief Executive Officer told a Senate oversight subcommittee some years ago:

We are a private corporation and as such, with stockholders and bondholders, we have a fiduciary responsibility to those individuals .... We are not charged with subsidizing the guaranteed student loan program or subsidizing the students.<sup>44</sup>

The accountability issue for GSEs, and for much of the quasi government, involves the allocation of benefits and risks between private parties and the federal government and taxpayer. One observer, Harold Seidman, has remarked: "Intermingling of public and private purposes in a profit making corporation almost inevitably means subordination of public responsibilities to corporate goals. We run

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<sup>43</sup> (...continued)

participants infer from such regulation that the government is all the more likely to back GSE debt." Testimony of the Alan Greenspan, Chairman, Board of Governors of the Federal Reserve System, in U.S. Congress, Senate Committee on Banking, Housing, and Urban Affairs, *Proposals for Improving the Regulation of the Housing Government Sponsored Enterprises*, hearings, 108<sup>th</sup> Cong., 2<sup>nd</sup> sess., February 24, 2004, p. 9.

<sup>44</sup> Statement of Edward A. Fox, President and CEO of Sallie Mae, before the Subcommittee on Education, Arts and Humanities, Committee on Labor and Human Resources of the U.S. Senate, *Oversight of Student Loan Marketing Association (Sallie Mae)*, Hearings, 102<sup>nd</sup> Cong., 2<sup>nd</sup> sess. (Washington: GPO, 1982), p. 135.

the danger of creating a system in which we privatize profits and socialize losses.”<sup>45</sup> Supporters would respond to this assertion by contending whatever profits they make are ultimately returned to benefit the public through lower mortgage rates.

## **Federally Funded Research and Development Centers (FFRDCs)**

One category of organization in the quasi government is largely a World War II and immediate postwar phenomenon, the federally funded research and development centers (FFRDCs).<sup>46</sup> The FFRDC is a hybrid organization designed to meet a federal need through the use of private organizations. In World War II, there was a national emergency requirement that scientific and engineering talent be rapidly assembled and put to work. National laboratories such as those at Oak Ridge and Los Alamos were created to be government owned, but operated by non-federal organizations which were not fettered by civil service rules or most general management laws. Under wartime conditions, these government-owned, contractor operated (GOCO) facilities worked quite well. Immediately after the war, the new Department of Defense, and particularly the Air Force, was reluctant to part with this talent base they had assembled, and sought ways and means to keep them in service to the government. The decision was to establish some private, nonprofit corporations to do contract work for the Armed Services. These corporations would be solely or largely dependent upon the federal government contracted projects.

The first FFRDC was RAND, created by the Air Force in California in 1947.<sup>47</sup> This pioneer was followed over the years by such well-known FFRDCs as Mitre Corporation, Aerospace, and the Institute for Defense Analyses. Of the 37 FFRDCs functioning in 2005 (down from 41 in 1988), most were established in the 1950s and 1960s.<sup>48</sup> This, though, does not mean that Congress has soured on FFRDCs. In fact, Congress has considered establishing a new FFRDC sponsored by the Department of Homeland Security.<sup>49</sup> Various FFRDCs have ceased to be listed, although not all those unlisted have ceased to exist; in several instances they have been transformed into private organizations. Although the Departments of Defense and Energy account for the bulk of the FFRDCs, the National Science Foundation has four R&D

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<sup>45</sup> Harold Seidman, *Politics, Position, and Power: The Dynamics of Federal Organization*, 5<sup>th</sup> ed. (New York: Oxford University Press, 1998), p. 213.

<sup>46</sup> For a brief history of FFRDCs, consult: James S. Hostetler, *Federally Funded Research and Development Centers: A Proper Role in the 1990s* (Vienna, VA: Professional Services Council, 1990).

<sup>47</sup> Bruce L. R. Smith, *The RAND Corporation: A Case Study of a Nonprofit Advisory Corporation* (Cambridge, MA: Harvard University Press, 1966).

<sup>48</sup> A list of FFRDCs may be found in Ronald L. Meeks, *Master List of Federally Funded Research and Development Centers (FFRDCs)* (Washington: National Science Foundation, 2004).

<sup>49</sup> CRS Report RS21542, *Department of Homeland Security: Issues Concerning the Establishment of Federally Funded Research and Development Centers (FFRDCs)*, by Michael E. Davey.

laboratories administered by universities, and NASA, the Federal Aviation Administration, the National Institutes of Health, and the Nuclear Regulatory Commission each have one. Many FFRDCs conduct research principally in classified fields for the Defense and Intelligence communities.

Critics have complained that FFRDCs provide fertile grounds for activities that inappropriately mix public funds and private interests. Critics see favoritism when FFRDCs receive large contracts without competitive bidding. Critics have also pointed to the interflow of personnel between government agencies, FFRDCs, and companies that work for FFRDCs. Critics say there is a revolving door between these entities and they decry “interlocking directorships” that arise (such as when a former Secretary of Defense took board positions at RAND and General Dynamics Corp.)<sup>50</sup> This latter charge is especially troubling because FFRDCs are supposed to be expertise-based organizations that are to impartially oversee the use of federal funds that are to advance a governmental purpose.

The great strength of FFRDCs appears to lie in their flexibility to assemble teams of technical experts on a project basis. High on the list of positive results supporters claim for FFRDCs is their ability to promote technology transfers between the governmental and private sectors. The knowledge base created by the agencies’ use of FFRDCs often serves as a foundation for commercially relevant efforts in the private sector. The U.S., many contend, is not as effective as other nations in taking the results of basic research and transforming them into commercially viable products to be sold in world markets.<sup>51</sup> FFRDCs are intended to promote and facilitate this transfer and development process. Technology transfer, however, is subject to many interpretations and is not without controversy.

Congress has been interested in FFRDCs almost from their inception. Some in Congress have viewed the FFRDCs as a means to circumvent civil service hiring practices and salary limitations. While they operate as nonprofit entities, FFRDCs can be a substantial source of revenue for associations and contractors, and there have been problems with conflict of interest issues.<sup>52</sup> FFRDCs are often difficult to hold accountable. They can have an advantage in competing with private firms for contracts: as nonprofit corporations, they are exempt from most taxation; their facilities and equipment are owned or financed, for the most part, by the federal government, and they receive fees for operating expenses without having to assume business risks or costs associated with competing for most federal work.

Questions by Congress have led to hearings, warnings, and some changes in law (e.g., Competition in Contracting Act of 1984; 98 Stat. 1175) that reduced the scope

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<sup>50</sup> Steven Pearlstein, “Reining In Pentagon’s Think Tanks,” *Washington Post*, July 28, 1991, p. H-1.

<sup>51</sup> CRS Issue Brief IB85031, *Technology Transfer: Use of Federally Funded Research and Development*, by Wendy Schacht. Michael M Crow, Mark A. Emmert, and Carol I. Jacobson, “Government-Supported Industrial Research Institutes in the United States,” *Policy Studies Journal*, vol. 19, Fall 1999: 59-74.

<sup>52</sup> E.g., interlocking directorships and the co-mingling of FFRDC and contractor interests in ways that compromise the FFRDC’s objectivity in overseeing the contractor work.

of contract work available to FFRDCs, making more outsourced work available to competitive contracting. Also, Congress has limited the Defense Department and others on creating FFRDCs.<sup>53</sup> For instance, the 99<sup>th</sup> Congress, passed legislation providing a statutory limitation (10 U.S.C. 2367) on DOD funding of FFRDCs and upon their creation. While the number of defense-related FFRDCs has declined, and is expected to decline further, support for new, civilian-oriented FFRDCs has increased. The Internal Revenue Service of the Department of the Treasury has the Tax Systems Modernization Institute, its own FFRDC.<sup>54</sup> Additionally, the Social Security Administration and the Environmental Protection Agency have, at other times, argued for associated private, nonprofit research centers as well. According to the most up-to-date data available, total federal obligations to FFRDCs in 2001 totaled over \$7 billion.<sup>55</sup>

Unusual and sensitive issues of conflict of interest may be present with FFRDCs, particularly when a FFRDC is an affiliate of a non-FFRDC corporation. FFRDCs often have privileged access to government information, plans, data, employees, and facilities which may be difficult to insulate from private partners involved in for-profit activities. Unbiased advice may also be difficult to provide when the future or fate of the advising FFRDC may be adversely affected.

Federal management of FFRDCs is based principally upon two regulations, OFPP [Office of Federal Procurement Policy] Policy Letter 84-1 and the Federal Acquisitions Regulations (FAR), which implement the policy letter. The thrust of the federal policy is that FFRDCs should not be established or employed unless the agency cannot accomplish the activity in-house, through other government agencies under the Economy Act,<sup>56</sup> or through regular procurement procedures.

The OFPP Policy Letter provides certain guidelines to be followed in establishing, organizing, and managing FFRDCs. For instance, FFRDCs cannot be used to perform quantity production and manufacturing work unless authorized by legislation. The OFPP Policy Letter and its guidelines do not apply to activities of a commercial character governed by OMB Circular A-76, which governs functions that may be contracted for by executive agencies.

## Agency-Related Nonprofit Organizations

The term, “agency-related nonprofit corporations,” represents an attempt to classify under one heading a number of different types of organizations that share one

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<sup>53</sup> Pearlstein, “Reining In Pentagon’s Think Tanks,” *Washington Post*.

<sup>54</sup> U.S. Congress, Senate, Committee on Governmental Affairs, *A Federally Funded Research and Development Center (FFRDC) for the IRS Tax System Modernization (TSM) Program*, S. Print 102-86, 102<sup>nd</sup> Cong., 2<sup>nd</sup> sess. (Washington: GPO, 1992).

<sup>55</sup> Ronald L. Meeks, *Federal Funds for Research and Development: Fiscal Years 2001, 2002, and 2003, vol 51* (Washington: National Science Foundation, 2004), Table C-14.

<sup>56</sup> 31 U.S.C. 1535. The Economy Act of 1932, as amended, permits, under certain circumstances, one federal agency to utilize the capabilities and/or resources of another federal agency.

characteristic: a legal relationship with a department or agency of the federal government. These relations may differ greatly from one situation and organization to the next. To assist our review, however, nonprofit organizations with legal relationships to departments and agencies will be considered under three categories: (1) adjunct organizations under the control of a department or agency; (2) organizations independent of, but dependent upon, departments and agencies; and (3) nonprofit organizations voluntarily affiliated with departments and agencies. Generally, the latter category of organizations are established under state or District of Columbia law. These three categories are not pure by any means. While these distinctions have an arbitrary character imposed after the fact, there is nonetheless some utility in beginning the review of the agency-related nonprofit organization category within the quasi government as being of three essential types.

**Adjunct Organizations Under the Control of a Department or Agency.** There are, at this point, an indeterminate number of organizations under the control of a department or agency; this review must therefore be illustrative, rather than comprehensive. Nonetheless, a survey of several such departmental or agency controlled organizations facilitates an understanding of the scope and nature of such organizations.

The Department of Agriculture makes extensive use of adjunct organizations. Presently, there are some 17 statutorily chartered agricultural commodity organizations (e.g., National Pork Board, National Dairy Promotion and Research Board).<sup>57</sup> Their purpose it is to engage in generic promotion of, research on, and information activities for agricultural commodities, thereby increasing the total market for a commodity separate from the promotion of any specific brand name of that commodity. The Secretary of Agriculture is assigned varying degrees of authority over these boards individually. In an effort to make uniform the oversight of such boards and the processes for creating additional boards, Congress passed the Commodity Promotion, Research, and Information Act of 1996 (P.L. 104-127; 7 U.S.C. 7411).

In the future, new commodity organizations (usually referred to as “boards” or councils”) will be established by the Secretary under departmental orders, rather than by statute, thereby, presumably, providing greater uniformity in chartering procedures and oversight provisions. The Commodity Promotion Act of 1996 is similar to a general incorporation act containing specific provisions to be included in the individual charters approved by the Secretary.

The provisions in the act respecting the annual activities and budget of the boards illustrate the type and level of secretarial and agency involvement with the boards.

SEC. 515 (e) Activities and Budgets —

(1) ACTIVITIES — Each order [secretarial order creating a board] shall require the board established under the order to submit to the Secretary for

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<sup>57</sup> CRS Report 95-353, *Federal Farm Promotion (“Check-Off”) Programs*, by Geoffrey S. Becker.

approval plans and projects for promotion, research, or information relating to the agricultural commodity covered by the order.

(2) BUDGETS —

(A) SUBMISSION TO SECRETARY — Each order shall require the board established under the order to submit to the Secretary for approval a budget of its anticipated annual expenses and disbursements to be paid to administer the order. The budget shall be submitted before the beginning of the fiscal year and as frequently as may be necessary after the beginning of the fiscal year.

(B) REIMBURSEMENT OF SECRETARY — Each order shall require that the Secretary be reimbursed for all expenses incurred by the Secretary in the implementation, administration, and supervision of the order, including all referenda costs incurred in connection with the order.

The concept behind these “independent” boards and councils is to encourage the commodity interests themselves to organize and propose to the Secretary that such an organization be chartered to promote a product (e.g., milk) generically, rather than by brand-name. These boards and councils are authorized by law to finance their activities by collecting “assessments” from members according to a rate structure that has received the approval of the Secretary. Once a producer is in one of the commodity promotion organizations, however, it is difficult to withdraw or ignore the assessments.<sup>58</sup>

The element of private influence and ultimate participation in these hybrid organizations resides in an elaborate, and as yet largely untested, process of referenda. As a practical matter, the commodity promotion organizations are under the supervision of the Agricultural Marketing Service (AMS), a relatively small unit within the department with a broad, multi-faceted mandate. The referendum provisions of the 1996 Act are detailed. The boards are not established in perpetuity, but must be subject to renewal referenda no later than seven years after assessments first begin. Even the definition of a majority is complex. For instance, the referendum majority provides : “A [secretarial] order may provide for its approval in a referendum — (1) by a majority of those persons voting; (2) by persons voting for approval who represent a majority of the volume of the agricultural commodity; or (3) by a majority of those persons voting for approval who also represent a majority of the volume of the agricultural commodity.” Advance registration procedures are spelled out in the law, thereby requiring subsequent changes to also be made by law. Finally, it is the AMS that is charged with administering what could amount to an almost continuing referendum process with one or another of the boards.

Notwithstanding this mandated oversight, the promotion programs (reportedly costing producers and importers nearly \$700 million a year) have been criticized by the department’s IG, policy opponents, and media critics for inappropriate spending, lax accounting, and lavish entertainments.<sup>59</sup> One consequence of this publicity was

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<sup>58</sup> William Claiborne, “Hog Farmers Given Vote on Marketing Fee Rules,” *Washington Post*, Feb. 29, 2000, p. A3.

<sup>59</sup> Sharon Walsh, “Government Oversight? USDA Asks: The Promotion Programs Have (continued...) ”

that the Secretary instituted a task force to make recommendations on how the department might better oversee the boards and their programs. The report, issued in December 1999, called for implementation of 21 recommendations, all of which then-Secretary Dan Glickman endorsed. Proposed changes were submitted to the *Federal Register* for public comment on December 17, 1999, but as of spring 2005 have not been formally adopted.<sup>60</sup>

Some of the agricultural advertising (check-off) programs have also faced court challenges. Small farmers providing “boutique” products have sued the Department of Agriculture, claiming the fees were “government compelled speech” — a violation of the First Amendment of the U.S. Constitution. In several of these cases, the plaintiffs have won.<sup>61</sup>

This is a case where the intentional creation of organizations assigned to the quasi government does not seem to solve or even reduce the political risks to government agencies for their activities. The public assumes that these activities have the imprimatur of the federal government, and expects accountability for their actions.

Over the years, departments and agencies have found it useful and advantageous to ask Congress to create, or authorize a department to create, nonprofit organizations to perform functions that the department itself finds difficult to integrate into its regular policy and financial processes. This is true, for example, when a department or agency receives gifts of real property and monetary gifts. The National Park Foundation is the most prominent example of such an organization, but there are others, such as the National Fish and Wildlife Foundation.

The Department of the Interior, and especially the National Park Service, received gifts of land and monies from time to time to promote the programs of the department. With respect to the National Park Service (NPS), a National Park Trust Fund was established by Congress in 1935 to receive and hold such gifts. In 1967, the Trust was superseded by the National Park Foundation (NPF), established pursuant to law (81 Stat. 656; 16 U.S.C. 19e-19n). The NPF is a congressionally chartered nonprofit corporation organized to accept and administer gifts given to the NPS. The board of the NPF has as its members the Secretary of the Interior, the

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<sup>59</sup> (...continued)

Been Criticized for Inappropriate Spending,” *Washington Post*, Dec. 16, 1999, p. E1. The \$700 million figure is for FY2003 and excludes the expenditures of the National Mango Board, which was created in 2004. Agricultural Marketing Service, “AMS Commodity Research and Marketing Boards” (Washington: April 28, 2004).

<sup>60</sup> See Department of Agriculture, Agricultural Marketing Service, “Guidelines for AMS Oversight of Commodity Research and Promotion Programs,” 65 *Federal Register* 5853, Feb. 7, 2000.

<sup>61</sup> E.g., *Joseph S. Cochran v. Anne Veneman, Department of Agriculture Secretary* (3rd Cir. 03-2522, Feb. 24, 2004), *Michigan Pork Producers Association, Inc. v. Veneman* (348 F. 3d 157 (6th Cir. 2003)), *Livestock Marketing Association v. U.S. Department of Agriculture* (335 F.3d 711 (8th Cir. 2003)), and *United States v. United Foods, Inc.* (533 U.S. 405 (2001))

Director of the NPS, *ex-officio*, and “no less than six private citizens appointed by the Secretary.” In 2005, there were over 20 board members. The term for private citizens on the board is six years. The Secretary of the Interior is chairman of the board and the Director of NPS is secretary to the board. The board elects a president of the foundation who serves at its pleasure. Membership on the board is not deemed to be an office of the United States. The NPF has perpetual succession.

Funding for the NPF comes from private gifts. One of the main initial purposes of the foundation was to permit the NPS to have a means whereby it might receive gifts and invest these funds in something other than federal government securities. The foundation is not on-budget and its employees are not federal employees. In 2003, the NPF provided over \$43 million in grants to the National Park Service.<sup>62</sup>

The foundation is viewed as an adjunct activity of the department and NPS, and is controlled by these agencies. The appointment process to the board is the Secretary’s principal insurance that the NPF will adhere to the general policy framework of the department.

Finally, the situation of the Securities and Exchange Commission (SEC) and its two adjunct organizations is worth noting. Congress established the Securities Investor Protection Corporation (SIPC) in 1970 (84 Stat. 1636) to assure that cash and securities held in brokerage firms are protected from loss caused by securities firms’ failures. The SIPC is a nonprofit corporation under the District of Columbia Nonprofit Act, which provides that it “shall not be an agency or establishment of the United States Government....” Of the seven-member board of directors, one is appointed by the Secretary of the Treasury from among the Department’s officers and employees; one is appointed by members of the Federal Reserve Board from among its officers and employees; five directors are appointed by the President subject to the advice and consent of the Senate. The President designates the chairman, who is also the corporation’s chief executive officer.

Although the SIPC is a nonprofit corporation under the D.C. law, it is effectively a subsidiary of the SEC. The corporation’s bylaws are subject to the SEC’s adoption, amendment, or rejection. The hybrid nature of the SIPC is revealed by various legal characteristics. The SIPC is not under any of the general management laws, including the Government Corporation Control Act (31 U.S.C. 9102). However, to the extent that the bylaws and rules of the SIPC are approved or disapproved by the SEC, they are subject to the Administrative Procedure Act (5 U.S.C. 551 et seq.). The corporation also has borrowing authority and a line of credit from the Treasury.

Congress, in 2002, established the Public Company Accounting Oversight Board (PCAOB) (116 Stat. 745) to oversee the audit of public companies that are subject to securities laws. The board is also a nonprofit corporation under the DC Nonprofit Corporation Act. Officers of the board are not officers of the United States. Yet the board is required, under supervision of the SEC, to “establish or adopt, or both, by rule, auditing, quality control, ethics, independence, and other

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<sup>62</sup> National Park Foundation, *Annual Report — 2003* (Washington: NPF, 2004), p. 2.



standards relating to the preparation of audit reports by issuers.” The SEC appoints the five members of the full-time board, after consultation with the chairman of the Board of Governors of the Federal Reserve System and the Secretary of the Treasury. The Commission may remove members of the board “for good cause.” The rules of the board are subject to the approval of the Commission. Some observers were troubled that at the organizing meeting of this “private” board on January 9, 2003, the board voted themselves annual salaries of \$452,000, or \$52,000 more than the President of the United States and \$207,000 more than the chairman of the SEC. Similar private sector salaries were set for staff.<sup>63</sup>

The stories of the SIPC and the PCAOB illustrate how the government can create a hybrid organization, in these instances organizations with predominately private-sector legal characteristics, to implement government policies and regulations. Ultimately, the SIPC and the PCAOB are agents of and accountable to the government through the SEC. The wisdom (and for some the legality) of this practice of delegating governmental functions to ostensibly private parties is a legitimate subject of debate.

**Organizations Independent of, But Dependent Upon, Agencies.** The Henry M. Jackson Foundation provides an example of an organization independent of, but dependent upon, an agency of the federal government. In 1982, Congress passed legislation to establish a Foundation for the Advancement of Military Medicine (P.L. 98-36; 97 Stat. 200). Five months later, the foundation was renamed the Henry M. Jackson Foundation after a Senator with a long record of support for military medicine. The enabling legislation provided that the foundation “shall not for any purpose be an agency or instrumentality of the United States Government. The Foundation shall be subject to the provisions of this section and, to the extent not inconsistent with this section, the Corporations and Associations Act of the State of Maryland.” This language indicates there is intended to be legal distance between the nonprofit organization and the United States government.

The mission of the foundation, by contrast, emphasizes that a close organizational relationship be established between the foundation and the Uniformed Services University of the Health Sciences (USU) of the Department of Health and Human Services. “It shall be the purpose of the Foundation (1) to carry out medical research and education research projects under cooperative agreements with the USU; (2) to serve as a focus for interchange between military and civilian medical personnel, and (3) to encourage the participation of the medical, dental, nursing, veterinary, and other biomedical sciences in the work of the Foundation for the mutual benefit of military and civilian medicine.” (10 U.S.C. 178) The nine-member board of the foundation includes two current Senators and two Representatives serving in an *ex-officio* capacity.

The foundation works to develop a research infrastructure involving federal military medical personnel and private medical personnel and facilities. It is affiliated with the USU and receives funding from private sources as well as the

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<sup>63</sup> Stephen Labaton, “Six Months Later, New Audit Board Holds First Talk: Sets Own Pay at \$452,000,” *New York Times*, Jan. 10, 2003, p. 1.

USU. The foundation provides research and grants management services to military medical researchers; manages clinical trials and develops private-public partnerships; and provides general support for military medical education. In 2004, the foundation employed 1,400 persons and supported or administered over 650 research projects.<sup>64</sup>

The question arises: why is such a foundation needed? The foundation has said:

Because government employees cannot accept money or in-kind gifts from private sources, the Foundation serves a vital function by facilitating collaborative relationships between private industry, academia, and military medicine. One way we do this is securing private funding to support military medical educational programs....<sup>65</sup>

Similarly, the Department of Veterans Affairs (VA) has a network of nonprofit corporations attached to its medical centers. By law (P.L. 100-322; 102 Stat. 487), the Secretary may authorize the establishment at any VA medical center of a nonprofit research and education corporation (NPC), to be chartered under the resident state law, “to provide a flexible funding mechanism for the conduct of approved research.”<sup>66</sup> The law reads: “Except as otherwise required in this subchapter or under regulations prescribed by the Secretary, any such corporation, and its directors and employees, shall be required to comply only with those Federal laws, regulations, and executive orders and directives which apply generally to private nonprofit corporations.” (38 U.S.C. 7361(a)).<sup>67</sup>

As of 2004, the latest data available, 92 VA medical centers had received approval for the formation of nonprofit research corporations. Presently, 88 are active in 40 states (e.g., Veterans Medical Research Foundation of San Diego; Albany Research Institute of New York).<sup>68</sup> They derive their funds from both federal and non-federal sources. In 2003, “NPCs reported \$185.2 million in revenues including interest income and other miscellaneous receipts.”<sup>69</sup>

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<sup>64</sup> Henry M. Jackson Foundation, HJF Overview Sheet, Dec. 2004, available at [[http://www.hjf.org/about/factsheet12\\_04.pdf](http://www.hjf.org/about/factsheet12_04.pdf)].

<sup>65</sup> See [<http://hjff.org/about/privatesupporters.html>].

<sup>66</sup> These entities have also been referred to as medical center research organizations.

<sup>67</sup> VA regulations for these entities may be found in *VA Handbook 1200.17, VA Research and Education Corporations* (Washington: VA, 2001), available at [[http://www1.va.gov/vhapublications/ViewPublication.asp?pub\\_ID=371](http://www1.va.gov/vhapublications/ViewPublication.asp?pub_ID=371)]; and *VA Handbook 1400.2, VA Education Corporations authorized by Title 38 United States Code (U.S.C.) Sections 7361 Through 73* (Washington: VA, 2001), available at [[http://www.navref.org/about/mem\\_handbook\\_14002.htm](http://www.navref.org/about/mem_handbook_14002.htm)].

<sup>68</sup> These data were drawn from National Association of Veterans’ Research and Education Foundations (NAVREF), *Compilation of Year 2003 Annual Reports submitted to VA* (Bethesda, MD: NAVREF, June 1, 2004), p. 3, at [[http://www.navref.org/library/Annual\\_Reports.htm](http://www.navref.org/library/Annual_Reports.htm)].

<sup>69</sup> *Ibid.*, p. 4.

The Secretary appoints the boards of all corporations, which must in each instance include the director of the medical center, the chief of staff and assistant chief of staff of the medical center, and such other public members as the bylaws of the corporation direct. Each of the corporations has an executive director appointed by the board of directors with the concurrence of the Chief Medical Director of the Department. The corporation may employ such employees as it considers necessary and fix their compensation. The corporations come under the jurisdiction of the Department's Inspector General. The directors and employees of the corporation "shall be subject to Federal laws and regulations applicable to Federal employees with respect to conflicts of interest in the performance of official functions" (38 U.S.C. 7366(c)(1)).

The medical center research organizations concept is not without its critics. Some NPCs have been faulted for expending funds on items not directly related to research (such as gifts and entertainment) and have been cited as in need of improved "accountability and oversight related to the administration of funds."<sup>70</sup> However, GAO has also reported that NPCs, have enhanced VA research efforts. Funds

collected by these nonprofits have been used to renovate laboratory space, purchase equipment, maintain VA research libraries, and cover travel expenses to conferences. In turn, the research environment has been able to attract highly qualified physicians, who often provide patient care, as well.<sup>71</sup>

### **Nonprofit Organizations Affiliated with Departments or Agencies.**

There are also nonprofit organizations, chartered under state law, that voluntarily affiliate with a departmental or agency program. This option has recently been reflected in law and applied by the Department of the Interior. As discussed above, the National Park Foundation (NPF) is appropriately viewed as an "adjunct organization under the control of a department or agency," in this case the National Park Service of the Department of the Interior. The NPF was authorized by the National Park Omnibus Management Act of 1998 (P.L. 105-391; 16 U.S.C. 190) to encourage the creation of nonprofit organizations with state charters to "assist and promote [philanthropy] at the individual national park unit level." The intent of this program is to create a large number ("the greatest number of national park units practicable") of local fund-raising partner organizations ("Park Partners"), each tied to a specific national park or national park program. For purposes of this report, it is worth noting that these Park Partners are to be created by persons within a community under their own state laws.

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<sup>70</sup> Statement of Michael Slachta, Jr., Assistant Inspector General for Auditing, in U.S. Congress, Subcommittee on Oversight and Investigation and Subcommittee on Health, House Committee on Veterans' Affairs, *VA Research and NonProfit VA Research and Education Corporations*, 107<sup>th</sup> Cong., 2nd sess., May 16, 2002 (Washington, GPO, 2003), pp. 4-6, quote at pp. 5.

<sup>71</sup> Testimony of Cynthia A. Bascetti, Director Healthcare — Veteran's Health and Benefits Issues, U.S. General Accounting Office, Subcommittee on Oversight and Investigation, House Committee on Veterans' Affairs, *VA Research and NonProfit VA Research and Education Corporations*, 107<sup>th</sup> Cong., 2nd sess., Sept. 19, 2002 (Washington, GPO, 2003), pp. 19-21.

It is intended that the Park Partners will voluntarily “affiliate” with the foundation. The law instructs the foundation to include in its program encouraging the creation of Park Partners:

- (1) a standard adaptable organizational design format to establish and sustain responsible management of a local nonprofit support organization for support of a national park unit;
- (2) standard and legally tenable bylaws and recommended money-handling procedures that can easily be adapted as applied to individual national park units; and
- (3) a standard training curriculum to orient and expand the operating expertise of personnel employed by local nonprofit support organizations. (16 U.S.C. 19o(d)).

A number of Park Partner organizations, some in existence prior to the law, are operating today in support of specific parks such as Grand Teton, Glacier, and Sequoia. Since there are 376 park properties within the system, the number of possible Park Partner nonprofit corporations is considerable. Although the clear intention of the legislation is that the local nonprofit corporations become affiliated with the Park Partner program of the foundation, the ultimate authority and accountability of the corporations remains with the local organization. The law provides: “An affiliation with the Foundation shall be established only at the discretion of the governing board of a nonprofit organization.” (16 U.S.C. 19o (f)(2))

## Venture Capital Funds

Hybrid organizations assigned by Congress to the quasi government perform a wide variety of functions in both the domestic and international arenas. With respect to the latter, the case of “venture capital funds” is especially interesting, a term which encompasses more narrowly defined “enterprise funds” and “investment funds.”<sup>72</sup>

The fall of Communism in eastern Europe and elsewhere in 1989 prompted interest by the United States, and especially Congress, in assisting those nations committed to a transition from a centrally planned to a market economy. The Support for Eastern European Democracy Act of 1990 (SEED) (P.L. 101-179; 22 U.S.C. 5401) authorized the establishment of two “enterprise funds,” one in Poland and the other in Hungary. Later the legislation was amended to authorize the creation of enterprise funds in other eastern European countries, including the republics of the former Soviet Union, and the southern Africa region. By the end of 1995, there were 11 such funds.

The impetus for the enterprise fund concept came about from the belief that a non-governmental entity was needed to implement this kind of program. The intent of Congress in SEED was to create venture capital funds that would be designed

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<sup>72</sup> A discussion of venture capital funds is to be found in: Jonathan G.S. Koppell, “The Challenge of Administration by Regulation: Preliminary Findings Regarding the U.S. Government Venture Capital Funds,” *Journal of Public Administration Research and Theory*, vol. 9, Oct. 1999, pp. 641-66.

along private sector lines, managed by private sector executives, and be free of most government administrative constraints.

The enterprise funds are chartered as private nonprofit corporations under the laws of the state of Delaware, but are funded by government appropriations. Their purpose is to develop the respective national private sectors through “loans, grants, equity investments, feasibility studies, technical assistance, training, insurance, guarantees and other measures.” Further, the act states that funding for the enterprises shall “be made available ... and used for the purposes of this section notwithstanding any other provision of law.” (22 U.S.C.A. 5421(a)(c)). The SEED Coordinator in the Department of State and AID’s General Counsel and Inspector General interpreted this “notwithstanding” clause as exempting the funds from customary U.S. assistance program regulations.

At the same time as the enterprise funds were being established, the Overseas Private Investment Corporation (OPIC), a wholly owned federal government corporation,<sup>73</sup> was itself becoming involved in promoting private investments through “investment funds” established in the former communist states. OPIC’s principal mission is to provide political risk insurance and loan guarantees to U.S. corporations that make investments in selected developing countries. Although OPIC is prohibited from making direct equity investments, it may achieve approximately the same results by guaranteeing loans made to private, profit-seeking corporate investment funds. By 2005, OPIC was supporting 30 investment funds (e.g., Caucasus Fund, Aqua International Partners) all over the world.<sup>74</sup>

In the case of both the enterprise funds and OPIC’s investment funds, the intent was to have a pool of money to be assigned by a private management team to promising new or existing ventures. It is not the intent of this Report to evaluate the programmatic success or failure of these investment programs, that is best found elsewhere.<sup>75</sup> Principal attention here is directed to some of the organizational characteristics of these venture capital funds and how they relate to the executive and legislative branches.

With respect to enterprise funds, it was the intention of Congress that executive branch oversight of the funds be limited, a “hands off” policy. Initially, State Department and AID oversight of the enterprise funds consisted principally of an annual review by the AID IG, audits performed by certified public accounting firms selected by the enterprises, monthly reports on grant cash balances, semiannual reviews of the investment portfolios, and brief visits to both the U.S. and overseas fund offices. Various news accounts of alleged excesses and failures of the funds

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<sup>73</sup> CRS Report 98-567E, *The Overseas Private Investment Corporation: Background and Legislative Issues*, by James K. Jackson. Eric Schmitt, “Development Agency’s Survival Tale: A Symbol of Corporate Welfare Becomes a Beacon of Enterprise,” *New York Times*, Jan. 12, 2000, p. C2.

<sup>74</sup> OPIC website: [<http://www.opic.gov/InvestmentFunds/funds2.asp>].

<sup>75</sup> U.S. General Accounting Office, *Enterprise Funds: Evolving Models for Private Sector Development in Central and Eastern Europe*, GAO/NSIAD-94-77, (Washington: GAO, 1994).

prompted both Congress and the executive branch, however, to subsequently strengthen the oversight of AID, although the funds still retain most of their autonomy.<sup>76</sup>

Enterprise funds are chartered as nonprofit corporations under the laws of the state of Delaware and are governed by a board of directors “designated” by the President of the United States and elected by the existing board members. They are not “officers” of the United States and hence are not subject to Senate confirmation. The directors must be citizens of the United States or of the host country (or countries) and can be designated only after “consult(ing) with the leaders of each House of Congress.” (22 U.S.C. 5421(a)(1)). Although Congress and the existing directors have a role to play in the selection process, the reality is that this process has largely become a presidential prerogative and, according to critics, involves a certain amount of presidential patronage. Contractors are selected to manage the funds in the name of the boards. Thus, the determination of which firm ultimately receives the capital is made by third, and occasionally fourth, parties. In the latter instances, the enterprise fund establishes a subsidiary to make the final loan or grant determinations.

The key element for protecting the government’s interests in the enterprise funds is to be found in the provisions agreed to in the loan or grant. Once in operation, it is difficult for AID to alter the course of the enterprise fund, although there remain several negative controls available, such as suspension of funds. In practice, however, such controls are difficult to implement.<sup>77</sup>

The OPIC investment funds are not in the business of directly providing capital themselves, rather they provide guarantees to private lenders who, in turn, lend money to recipients. OPIC is a government corporation enumerated in the Government Corporation Control Act and, as such, is a regular agency of the United States subject to the general management laws, except where exempted. It is governed by a 15-member board of directors, a number that includes in an *ex officio* capacity various senior presidential appointees, as well as seven direct presidential appointees (22 U.S.C. 2193(b)). The board is chaired by the Administrator of AID. It is the President who appoints OPIC’s President, subject to Senate confirmation.

Congress requires OPIC to undergo annual budgetary review, and the office is sometimes criticized on the basis that its insurance programs amount to a subsidy to some prosperous American corporations at taxpayers’ expense.<sup>78</sup> OPIC has been able to keep relatively close oversight of its investment funds through its active role in selecting fund management and in negotiating terms of the loan guaranty agreements, terms that generally provide for favorable returns to OPIC. The

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<sup>76</sup> Peter Maas, “Congressman Charges Aid Effort Goes Awry: Hungary Enterprise Fund Pays Fat Salaries,” *Washington Post*, July 29, 1993, p. A15; Doug Bandow, *Uncle Sam as Investment Broker*, Cato Institute Policy Analysis No. 260 (Washington: CATO Institute, 1996).

<sup>77</sup> Koppell, “Managing the U.S. Government Capital Portfolio,” p. 12.

<sup>78</sup> Leslie Wayne, “Spreading Global Risk to American Taxpayers,” *New York Times*, Sept. 20, 1998, Section 3, p. 1.

objective of OPIC's investment fund oversight is to insure compliance with the loan agreement, not necessarily to review or evaluate the fund's investments in terms of good economic returns. Thus, compliance, rather than performance, is the primary focus of OPIC's fund oversight.

In reviewing the comparative experience of enterprise and investment funds as part of a larger national venture capital promotion exercise, Koppell concludes that the federal government has the best opportunity to maintain a modicum of accountability over these institutions through enforcement of regulatory practices, rather than attempting to run these quasi governmental bodies through direct administrative means. Koppel does not award the board of directors concept high marks as an effective method to promote accountability.<sup>79</sup>

The issue of tenure is pertinent to venture capital funds. Are they intended to be permanent or temporary? Although Congress did not address this question directly with respect to enterprise funds, it was generally viewed that they would be a temporary arrangement. The length of time that each venture fund exists would depend on the specific country circumstances. For example, in September 2001, the Polish-American Enterprise Fund (PAEF) returned \$120 million of its assets to the U.S. Treasury and transferred \$180 million of its assets to the newly created Polish American Freedom Foundation — an entity which had previously received \$80 million from PAEF. The funds are to be used to provide grants to promote economic reform, leadership development among Polish citizens, a stronger civil society, improved local government, and more.<sup>80</sup>

Venture capital funds are not exhausted by discussion of international enterprise and investment funds. There has been recently been established a venture capital fund, "In-Q-Tel," under the auspices of the Central Intelligence Agency (CIA).<sup>81</sup> The announced purpose of In-Q-Tel is to permit the CIA to invest in, and thereby encourage, corporations producing technology the agency believes it will need to perform its mission in the future. Capitalized by \$150 million in government funds, this nonprofit corporation is expected to be self-sufficient. On the board of directors are private corporate executives from firms such as Lockheed Martin. In the words of Gilman Louie, In-Q-Tel's CEO:

The best thing about In-Q-Tel, to me, is that it's risky. The CIA and the rest of the government need to catch the entrepreneurial, risk-taking spirit that's driving the Silicon Valley technology revolution. The CIA's new venture may fall flat, but so what. Washington has been a zero-defect culture for too long. If we want

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<sup>79</sup> Koppell, "Managing the U.S. Government's Venture Capital Portfolio," pp. 25-34.

<sup>80</sup> U.S. White House Office, Office of the Press Secretary, "Fact Sheet: Polish American Freedom Foundation" (Washington: June 15, 2001), available at [<http://www.whitehouse.gov/news/releases/2001/06/20010615-11.html>].

<sup>81</sup> There are reports that both the Department of the Army and the National Aeronautics and Space Administration have moved to create venture capital funds modeled on In-Q-Tel. For example, see Graham Warwick, "Agencies Seek Commercial Input," *Flight International*, Sept. 14, 2004, p. 27.

a CIA that performs better, we'll need to take more risks — and give our government freedom to fail.<sup>82</sup>

Venture capital funds in which the federal government participates, either as the only party, or in cooperation with other parties, are often controversial. This is so because such funds require the government to participate in the private equity market and, in the eyes of some, to pick “winners.” Being a sovereign entity, the government cannot act as a private party seeking to maximize its fiduciary interests.

## **Congressionally Chartered Nonprofit Organizations**

Within the quasi government, a category of entities can be collectively identified as “congressionally chartered nonprofit organizations,” also referred to popularly as “title 36 corporations.”<sup>83</sup> The chartering by Congress of private organizations with a patriotic, charitable, historical, or educational purpose is essentially a 20<sup>th</sup> century practice. There are presently some 90 organizations listed under Subtitle II, “Patriotic and National Organizations.”<sup>84</sup> Typical among these chartered organizations is the Agricultural Hall of Fame; Big Brothers and Sisters of America; and the American Legion.

Congress has authority to establish organizations within both the governmental and private sectors. In the governmental sector, the authority and responsibility to establish all agencies and all offices to be filled by appointed officers of the United States is clear. The actions of all agencies and officers of the United States are determined by public law. Congress also has authority to charter (establish) new private corporations, both for-profit and nonprofit. While Congress has exercised its prerogatives to charter for-profit corporations infrequently, there have nevertheless been several important instances, such as the establishment of the fully private, stockholder-owned Communications Satellite Corporation (ComSat) in 1962 (47 U.S.C. 701). Much more frequently, Congress has chartered nonprofit organizations, either in the first instance, or as a rechartering of an existing state chartered nonprofit organization.

Title 36 corporations can, and generally do, function simultaneously under both federal and state charters. Indeed, in most instances, organizations were chartered and functioned under state laws before, often long before, receiving federal charters. Congressional authority with respect to organizations functioning essentially under state law, however, has not been free of controversy. The basis of the controversy often comes down to fundamental issues of managerial accountability, fiduciary responsibility, and rights that inhere to governmental organizations, but not to private

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<sup>82</sup> David Ignatius, “The CIA as Venture Capitalist,” *Washington Post*, Sept. 29, 1999, p. A1.

<sup>83</sup> CRS Report RL30340, *Congressionally Chartered Nonprofit Organizations* (“Title 36 Corporations”): *What They Are and How Congress Treats Them*, by Ronald C. Moe.

<sup>84</sup> Title 36 of the U.S. Code, where congressionally chartered nonprofit corporations are listed with their charters, was recodified by law in 1998 (P.L. 105-225). Although some 100 organizations are currently listed in Title 36, nine of the organizations fall into two new categories in the title, thus leaving 90 organizations under Subtitle II; the latter category will receive the major part of this report’s attention.



organizations, such as the right to the full faith and credit of the United States treasury.<sup>85</sup>

In chartering patriotic, charitable and professional organizations under Subtitle II, such as the National Academy of Public Administration (36 U.S.C. 1501), Congress does not make these organizations “agencies of the United States,” nor does it confer any powers of a governmental character, or assign any benefits. These organizations do not receive direct appropriations, they exercise no federal powers, their debts are not covered by the full faith and credit of the United States, and they do not enjoy original jurisdiction in the federal courts.

In effect, the federal chartering process is honorific in character. This honorific character may be misleading to the public, however, when such organizations feature statements or display logos that they are “chartered by Congress,” thus implying a direct relationship to the federal government that does not, in fact, exist. In addition, there may be an implication that Congress approves of the organizations and is somehow overseeing their activities, which is not the case.

Recently, the non-agency character of Title 36 corporations may have been breached. The “privatization” of the Defense Department’s Civilian Marksmanship Program and its assignment to a newly created Title 36 corporation, the Corporation for the Promotion of Rifle Practice and Firearms Safety (36 U.S.C. 407), raises questions about the limits, if any, to Congress’ authority to assign a “private” label to functions of a governmental character.<sup>86</sup> While the Corporation has some admittedly governmental attributes (e.g., upon the dissolution of the Corporation, its assets would be sold and the proceeds revert to the U.S. Treasury), Congress has declared in its enabling statute that “the corporation is a private corporation, not a department, agency, or instrumentality of the United States Government.” Furthermore, the law provides that “an officer or employee of the corporation is not an officer or employee of the Government.” Whether Congress has the constitutional authority to establish an entity “private,” when in fact it has “governmental” attributes, has been subject to debate and judicial opinion.<sup>87</sup>

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<sup>85</sup> See discussion of the legal status of the earlier, now defunct, entry in the quasi government, the Federal Asset Disposition Association (FADA) established by the Federal Home Loan Bank Board in 1985 under the incorporation act of the state of Colorado in: U.S. General Accounting Office, *Failed Thrifts: No Compelling Evidence of a Need for the Federal Asset Disposition Association*, FFO/FFD-89-26 (Washington: GAO, 1989). U.S. Congress, Senate, Committee on Governmental Affairs, *Managing the Public’s Business: Federal Government Corporations*, by Ronald C. Moe, committee print 104-18, 104<sup>th</sup> Cong., 1<sup>st</sup> sess. (Washington: GPO, 1995), pp. 22-26.

<sup>86</sup> The 2004 omnibus appropriation act (P.L. 108-447, Div. K, Sec. 146) declared that the National Veterans Business Development Corporation (NVBDC), thought by some to be a wholly government corporation, to be wholly private. On NVBDC as a government corporation, see Office of the Legal Counsel, United States Department of Justice, *Memorandum for Jennifer Newstead, General Counsel, Office of Management and Budget*, March 19, 2004.

<sup>87</sup> The Supreme Court in a 1995 case (*Michael Lebron v. National Railway Passenger* (continued...))

Private, nonprofit organizations seeking federal charters under Title 36 presumably perceive value behind such charters, and indeed, such may be the case. Less apparent, however, are possible risks that might result from private, nonprofit organizations of having such a charter. A chartered private organization may lose some of its private rights and be made subject to management laws and regulations generally applicable only to agencies of the United States. Such a situation came about in 1997 when Congress amended the Federal Advisory Committee Act (5 U.S.C. Appendix; 86 Stat. 700) so as to include two Title 36 corporations, the National Academy of Public Administration and the National Academy of Sciences, under specific provisions involving the appointment, permissible activities, and reports of corporation committees doing work for executive agencies. (P.L. 105-153)

This is the first instance in which Congress has made Title 36, Subtitle II corporations subject to the provisions of a general management law, and, while the action may be supportable on public policy grounds, it does, to the extent of applicable provisions, diminish the private character of the affected organizations. As such, it constitutes a precedent with implications.

Congress and the President have raised questions in the past about the consequences of granting charters to private organizations. In vetoing a corporate charter in 1965, the President raised several questions about the wisdom of continuing to grant charters on a case-by-case basis “without the benefit of clearly established criteria as to eligibility.”<sup>88</sup> Congress, in 1969, responded to this presidential concern by setting out five “minimum standards” to be met by a private organization seeking a federal charter from Congress.<sup>89</sup> These standards, however,

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<sup>87</sup> (...continued)

*Corporation*; 513 U.S. 374) addressed the question of whether Congress can declare, by statutory language, that a corporation created by Congress and assigned attributes of the state, is a “private corporation.” The National Railway Passenger Corporation (AMTRAK), established by Congress (45 U.S.C. 451) and enumerated as a “mixed-ownership corporation” under 31 U.S.C. 9101(2), was sued by Michael Lebron for rejecting on political grounds an advertising sign he had contracted with them to display. Lebron claimed that his First Amendment rights had been abridged by AMTRAK because it is a government corporation, and therefore an agency of the United States. AMTRAK argued, on the other hand, that its legislation provides that it “will not be an agency or establishment of the United States government” and thus is not subject to constitutional provisions governing freedom of speech. The Court decided that while Congress can determine AMTRAK’s governmental status for purposes within Congress’ control (e.g., whether it is subject to statutes such as the Administrative Procedure Act), Congress cannot make the final determination of AMTRAK’s status as a government entity for purposes of determining constitutional rights of citizens affected by its actions. To do so, in the Court’s opinion, would mean that the government could evade its most solemn constitutional obligations by simply resorting to the corporate form of organization.

<sup>88</sup> A copy of the veto message is printed as H. Doc. 292, 89<sup>th</sup> Cong., 1<sup>st</sup> sess. (Washington: GPO, 1965), p. 1.

<sup>89</sup> U.S. Congress, House, Committee on the Judiciary, *Standards for Granting of Federal Charters to Non-Profit Corporations*, committee print, 91<sup>st</sup> Cong., 1<sup>st</sup> sess. (Washington: GPO, 1969).

did not resolve all of the questions concern the process of granting a charter, or of overseeing nonprofit organizations.

At present, federal supervision of congressionally chartered nonprofit organizations is limited.<sup>90</sup> All “private corporations established under federal law,” as defined and listed in Subtitle II, are required to have independent audits annually, and to have the reports of the audits submitted to Congress (36 U.S.C. 10101).<sup>91</sup> In practice, the House Subcommittee on Immigration and Claims receives the audit reports of listed corporations, and, where corporations have not submitted reports in a timely manner, makes every effort to communicate with said organizations and remind them of their legal responsibility. The House Judiciary Committee refers all received audits to the General Accounting Office for review.<sup>92</sup> The committee’s current role is strictly ministerial. Public access to the records and reports of Title 36 corporations varies. For example, the charter of the National Ski Patrol (36 U.S.C. 1527) requires that its annual report be submitted each year to Congress but forbids the public printing of it. As for the Senate Judiciary Committee, it has traditionally deferred to the House committee on these matters.

It is not the intention of the Judiciary Committees of Congress or the General Accounting Office to “look over the shoulder” of these organizations, or to conduct audits on their own authority. Congress is understandably ambivalent with respect to chartered organizations; it attempts to protect the public interest against abuse by these corporate bodies while simultaneously seeking to limit its involvement in the internal affairs of these private organizations. Thus far, in no instance has the charter of a Title 36 organization been revoked or placed at serious risk through non-compliance with reporting requirements.

Hearings held by subcommittees of the respective judiciary committees of the House and Senate in the early 1970s raised a number of questions by Members of Congress respecting the intent and practice of congressional chartering of private, nonprofit organizations. More organizations, through sympathetic members of Congress, were requesting charters, and the requesting organizations were often extending the definition of congressional chartered corporations beyond that typically associated with patriotic and service organizations.

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<sup>90</sup> With most generalizations concerning congressional chartered nonprofit organizations, there are exceptions. An exception to the general rule that Congress rarely becomes actively involved in overseeing these bodies is provided by the U.S. Olympic Committee (36 U.S.C. 2205). Amy Shipley, “Senators Scold USOC Leaders: Congressional Oversight Urged as Part of Restructuring,” *Washington Post*, Jan. 29, 2003), p. D-1.

<sup>91</sup> The Corporation for the Promotion of Rifle Practice and Firearms Safety, created in 1996 by Congress, and not incorporated first in a state, is exempted (§407) from the audit requirements otherwise applicable to all but eight Subtitle II corporate organizations (36 U.S.C. 101).

<sup>92</sup> See, for instance, U.S. General Accounting Office, *Federally Chartered Corporation: Review of the Financial Statement Audit Report for the United States Capitol Historical Society for Fiscal Year 1997*, B-280210, directed to the Chairman of the House Judiciary Committee, Henry Hyde, June 16, 1998.

In April 1992, House Subcommittee on Immigration and Claims chairman Barney Frank announced that the subcommittee would no longer consider requests for charters. The reason, Frank reportedly said, was that the charters were “a nuisance,” a meaningless act; granting charters implied that Congress was exercising some sort of supervision over the groups and it was not. “When I first raised the issue, ‘What is a federal charter?’ The answer was, a federal charter is a federal charter.... You could make up an organization for the preservation of Albert De Salvo, the Boston Strangler. We’d have no way of checking into it.”<sup>93</sup>

Continuing to review applications on the basis of merit with the possibility of rejection, it was asserted, was subjecting the subcommittee to pressures and the potential for embarrassment to both the requester and Congress. By indicating an end altogether of the practice of chartering, it was hoped the subcommittee would be “leveling the playing field” among worthy organizations. This view was formalized in the 104<sup>th</sup> Congress when the subcommittee issued an internal policy directive that it would no longer consider any legislation to grant new federal charters because such charters were unnecessary for the operations of any charitable, nonprofit organization and falsely implied to the public that a chartered organization and its activities somehow enjoyed congressional approval.

This subcommittee moratorium did not, however, stop all requests for, or consideration of, charter requests. Notably, it remains possible for another committee, or for the full Congress in its plenary capacity, to “charter” nonprofit organizations and have them listed in Title 36. This has happened in at least six instances in recent years. Nonetheless, in the 109<sup>th</sup> Congress, the Subcommittee on Immigration, Borders, and Claims reasserted the moratorium on March 10, 2005.<sup>94</sup> It remains to be seen, however, how effective this moratorium will be against the many attractions of the chartering practice.

## Instrumentalities of Indeterminate Character

Not all the hybrid organizations fit into categories within the quasi government. Some organizations are *sui generis* while others partake of so many varied characteristics that they are best viewed and considered separately. Illustrative of quasi governmental entities are three examples that arguably merit discrete review.

- (1) American Institute in Taiwan
- (2) National Endowment for Democracy
- (3) United States Investigation Services

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<sup>93</sup> Bill McAllister, “Congressional Charters Abolished: Laws Recognizing Organizations Seen as Meaningless Nuisance,” *Washington Post*, Apr. 9, 1992, p. A25.

<sup>94</sup> U.S. Congress, Subcommittee on Immigration, Borders, and Claims, *Subcommittee Organizational Meeting to Consider the Subcommittee’s Rules of Procedure for Private Immigration Bills, Rules of Procedure for Private Claims Bills, and Policy on Federal Charters for Private, Non-Profit Organizations*, Mar. 10, 2005. Video of this committee meeting may be found at [<http://boss.streamos.com/real/hjudiciary/immigration/imm0310.smi>].

**American Institute in Taiwan.** In December 1978, President Jimmy Carter decided to establish full diplomatic relations with the People's Republic of China, and did so effective January 1, 1979; the two countries exchanged ambassadors on March 1, 1979. As part of the arrangement, the President agreed to end the 1954 mutual defense treaty with Taiwan and close the U.S. embassy in Taipei, the capital of the Republic of China (Taiwan).<sup>95</sup> This decision was strongly objected to by a number of Senators, who maintained that treaties could not be terminated unilaterally by the President.<sup>96</sup>

The Congress, presented with a presidential fait accompli, prepared legislation that would permit a continuing relationship with Taiwan (Republic of China) without the relationship being officially diplomatic in character.<sup>97</sup> The decision was to establish a hybrid body that would provide a de facto rather than de jure representation. Congress enacted the Taiwan Relations Act (P.L. 96-8; 22U.S.C. 3301), signed by the President on April 10, 1979, a key provision of which was the establishment of the American Institute in Taiwan (Institute) as a private, nonprofit corporation under the laws of the District of Columbia.

The Institute, to be principally located in Taiwan, was nonetheless directed to maintain its headquarters in the United States. The officers and employees of the Institute are officers and employees of the United States who are "separated" from their agency during the specified period of employment within the Institute. As a practical matter, most employees are Foreign Service officers "separated" from the Department of States, who remain entitled to governmental benefits during the separation period. It was anticipated that Taiwan would establish a similar organization to the Institute, which it did.

In subsequent years, political relations between the United States and the Peoples Republic of China have had their ups and downs, a situation with tangential impact on United States-Taiwan relations. These political strains have, to all appearances, not adversely impacted the functioning of the Institute. The Institute has generally provided an effective channel for government to government relations. Although the legal status of the Institute remains intentionally ambiguous, this has not yet resulted in any major public conflicts.

**National Endowment for Democracy.** In 1983, the Reagan Administration requested Congress to pass legislation for "Project Democracy" to promote and support the building of democratic institutions abroad, especially in countries newly

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<sup>95</sup> For a discussion of the political elements behind the President's decision to recognize the People's Republic of China (and the consequent withdrawal of recognition from the Republic of China), see "New Relationship with Taiwan Approved," *1979 CQ Almanac* (Washington: CQ Press, 1980), pp. 99-117.

<sup>96</sup> Louis Fisher, *Constitutional Conflicts Between Congress and the President* (Lawrence, KS: University Press of Kansas, 1997), pp. 242-45. Susan Grayburn, "Goldwater v. Carter," *Brooklyn Journal of International Law*, vol. 7, Winter 1998, pp. 111-33.

<sup>97</sup> For a discussion of recent relations between the United States and the Republic of China (Taiwan) generally, see *A Legislative History of the Taiwan Relations Act*, vol. 3, eds. Lester Wolff, Jon D. Holstine, and David J. Lewis (New York: Pacific Community Institute, 1999).

emergent from totalitarian or dictatorial rule. Although the specific Administration proposal was not adopted, Congress did enact legislation that included approval for creating a National Endowment for Democracy (NED) (Endowment). The NED proposal was included in Title V of the State Department Authorization Act, FY1984 and FY1985 (P.L. 98-164; 22 U.S.C. 4411).<sup>98</sup>

The National Endowment for Democracy Act reads: “The Congress finds that there has been established in the District of Columbia a private, nonprofit corporation known as the National Endowment for Democracy, which is not an agency or establishment of the United States.” (4411(a)). The purpose of NED is to encourage the development of free and democratic institutions throughout the world using the two major American political parties and labor and business organizations as the tools for promoting this policy.

Although the law did not specify the creation of grantee organizations, it was generally understood at the time that four “core organizations” representing the two major political parties, American labor organizations, and American business organizations would be created as private, nonprofit organizations. The NED would not conduct democracy programs itself but would rely on core grantees. The four organizations ultimately receiving grants were, and remain, the National Democratic Institute of International Affairs (NDI); the International Republican Institute (IRI); the American Center for International Labor Solidarity (ACILS);<sup>99</sup> and the Center for International Private Enterprise (CIPE), affiliated with the U.S. Chamber of Commerce.

The rationale given for creating a hybrid status for the Endowment was that for NED to support democracy building programs, especially in inhospitable countries (countries where the U.S. is banned by law from providing direct foreign aid, such as the People’s Republic of China and Myanmar (Burma)), it must not be viewed as an arm of the U.S. government. Additionally, the core grantee organizations are one step further removed from the government, and thus provide a fourth-party administration of the infrastructure promotion system. The Endowment was envisioned principally as a conduit for funds to the grantee organizations, but has developed on its own a network for funding of other private organizations.

Under the by-laws of the organization as registered in the District of Columbia, NED has a board of directors which has ranged over time between 13 and 25 members, the number being 23 in FY2005. The directors elect the president of NED and fill vacancies among their own number. The NED board is not subject to extensive government oversight and has retained the same individual, Carl Gershman, as president since the inception of the Endowment in 1983. The current chairman of the board of directors is Vin Weber, a former Member of Congress.

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<sup>98</sup> CRS Report 96-222, *National Endowment for Democracy: Policy and Funding Issues*, by Susan B. Epstein.

<sup>99</sup> The American Council for International Labor Solidarity, an organization created in 1997, was the result of the merger of the Free Trade Union Institute and three other AFL-CIO regional labor institutes. *Ibid.*, p. 2.

Funding of NED is provided by an earmarked appropriation in the Commerce, Justice, State Appropriations Act whereby the Department of State awards these funds to NED. In turn, by general agreement, NED provides a stated percentage of its funding equally to its four core grantees. The remaining funds are viewed as discretionary within NED's purview and administration for distribution to other private organizations. The total NED appropriation for FY2005 was \$60 million.

While the NED considers itself to be private, it must be managed under requirements of several general management laws. For instance, the Endowment must comply with the provisions of the Freedom of Information Act.<sup>100</sup> Also, while the accounts of the Endowment are audited by independent firms, they are subject to review, and may be audited, by the General Accounting Office.

There has been debate in Congress over whether the United States government should be funding these types of organizations to "promote democracy." The arguments pro and con necessarily impact NED as well as its core grantee organizations. From the perspective of the quasi government, NED is a classic example of a hybrid organization functioning under both private and public law. There is a range of opinion as to whether such a hybrid arrangement is necessary to achieve the results intended by the lawmakers.<sup>101</sup> Furthermore, critics have accused NED of mission creep. NED has been associated with efforts to influence the outcomes of ostensibly democratic elections.<sup>102</sup>

**U.S. Investigation Services.** As part of Vice President Gore's "reinvention" program, a substantial downsizing of the civil service was ordered.<sup>103</sup> Agencies were expected to be "creative" in making sure the work continued to be done, but with less personnel and less funds. Cuts in the mission, capacity, funding, and personnel of the central management agencies (i.e., Office of Management and Budget; General Services Administration; and Office of Personnel Management) were particularly significant. At OPM, the security and investigations unit of the agency was a potential target for downsizing because its securities clearance workload was declining due to the end of the Cold War and because there were fewer new hires generally throughout the executive branch.

The Director of OPM, James King, created a first, the establishment by the government of a private corporation whose employees would be persons transferred

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<sup>100</sup> "Notwithstanding the fact that the Endowment is not an agency or establishment of the United States Government, the Endowment shall fully comply with all of the provisions of section 522 of Title 5." (22 U.S.C. 4415(a))

<sup>101</sup> Despite being a not-for-profit chartered under the District of Columbia, NED is viewed by some as governmental. If this perception is widespread in other nations, then a major justification for NED's status as a quasi governmental entity comes into question. Recall, NED was created as a quasi because it was not supposed to be viewed as an independent, nongovernmental entity.

<sup>102</sup> Juan Forero, "The Chavez Victory: A Blow to the Bush Administration," *New York Times*, Aug. 20, 2004, p. 1; and Max Boot, "Exporting the Ukraine Miracle," *Washington Times*, Jan. 3, 2005, p. A12.

<sup>103</sup> National Performance Review, *Report*, p. 14.

from a federal agency, the Federal Investigations Division of OPM, to a private firm to be eventually owned by its employees in what is known as a Employee Stock-Owned Plan (ESOP).<sup>104</sup> The stated rationale was that it would save the jobs of the approximately 700 investigators who would no longer be needed and that it would save the federal government money by contracting with this new corporate body the investigations formerly performed in-house.

Director King of OPM let a contract to ESOP Advisors, Inc. for a feasibility study of the concept, a study that reported that the privatization process culminating in an ESOP was feasible. King then announced his intention to move forward rapidly. Two hearings were held by congressional committees.<sup>105</sup> The principal points argued by the opposition dealt with civil rights and privacy issues associated with private parties conducting and storing sensitive investigatory reports, and the propriety and legality of having government agencies creating privately owned corporations with special, financially advantageous relations, with the sponsoring agency. To the surprise of some, OPM, however, determined to move on its own initiative and without statutory authority.<sup>106</sup>

To launch the corporation, OPM choose American Capital Strategies (ACS) to develop a business plan. ACS selected Marine Midland Bank of New York as a financial trustee and together with Washington law firm, Arnold and Porter, began to recruit a management team. They selected, with King's agreement, Philip Harper, a former security industry official, to take the first step, incorporating the company to be known as the US Investigation Service (USIS) under the laws of the state of Delaware in April 1996. The corporation at this point had a single share and a single employee — Harper.<sup>107</sup>

The corporation was reincorporated in August 1996, at which time the 700 former Office of Federal Investigations employees were separated from the government and became private employees. In April 1997, it was reported:

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<sup>104</sup> Stephen Barr, "OPM, In a First, Acts to Convert an Operation Into Private Firm," *Washington Post*, Apr. 14, 1996, p. A4.

<sup>105</sup> U.S. Congress, House, Committee on Government Reform and Oversight, Subcommittee on Civil Service, *Oversight of Federal Investigations Policy*, Hearings, 104<sup>th</sup> Cong., 1<sup>st</sup> sess. June 14, 1995 (Washington: GPO, 1995);———. *Outsourcing of OPM's Investigations Program*, Hearings, 104<sup>th</sup> Cong., 1<sup>st</sup> sess. June 15, 1995 (Washington: GPO, 1995).

<sup>106</sup> USIS's official public website says: "On July 8, 1996, USIS was formed on the initiative of the President and Congress as an employee-owned company" (see [<http://www.usis.com/history/history.html>]). USIS, unlike ComSat or the Red Cross, has no congressional or federal charter. For its part, OPM told Congress that "[w]ith respect to contracting with an ESOP trustee to establish an ESOP corporation, we determined that no statute prohibited OPM from contracting for these services and that expending funds to enter into such a contract was a necessary expense pursuant to applicable fiscal law authority.... Therefore, OPM's decision to contract with an ESOP trustee does not require legislation." *Outsourcing of OPM's Investigations Program*, Hearings, 1995, p. 54.

<sup>107</sup> Ronald P. Sanders and James Thompson, "Reinventing Government: Live Long and Prosper," *Government Executive*, Apr. 1, 1997, pp. 51-53.



[The] 700 employee-shareholders own about 91 percent of a company valued at \$28.2 million. Harper and the other 11 company officers, who together put up an initial seven-figure investment, hold the remaining shares. Under the terms of its corporate charter, USIS is governed by a nine-member board of directors. The board's five "inside" members include Harper and two others elected by employees; the three of them in turn nominate the two remaining members. However, as with most private companies, the board's role is limited. It does not run USIS — that's Harper's job, along with his immediate staff — instead concerning itself strictly with 'ownership issues' like oversight. For example, it ensures that company resources are allocated in the best interests of employee shareholders, and it also approves key strategic decisions. Of course, such issues are made easy when you begin a business with the federal government as a guaranteed customer.<sup>108</sup>

OPM then awarded USIS a noncompetitive three-year contract under a "public interest" exemption in federal contracting law.<sup>109</sup> It was reported that the OPM employees would not have moved to the new private corporation without a guaranteed, sole-source contract providing a modicum of security. USIS has free access to government computer databases not otherwise available to the public or possible competing corporations. By any account, this government-sponsored, private corporation was given advantages and incentives not available to other private start-up corporations.<sup>110</sup>

Critics of USIS and the privatization process followed in its creation tend to argue that background investigations are an inherently governmental function to be conducted by regular federal employees operating under all government management and security protection laws. They believe that legal accountability should be direct up through the agency, departmental and central management agency line to the President, and through the President to Congress. From their point of view, policy considerations, such as seeking to find jobs for otherwise underutilized or redundant employees, seeking lower unit costs, and the desirability of "profitability" for governmental activities, while of academic and political interest, are essentially not relevant as justifications for creating and supporting this hybrid organization. The critics argue that not all personnel investigations are alike and assert that the needs and requirements of the government (and indirectly of the public giving information to the government) are distinctive in legal terms from those applicable in the private sector. In their view, the issues are not economic in their fundamentals, but constitutional and legal. Moreover, the question arises: if OPM is free to transfer a portion of its workload and employees to the private sector, may other agencies do likewise?

The Clinton Administration and supporters of OPM's decision to "privatize" this activity, saw, on the other hand, in the USIS experience, a creative response to a changing situation regarding a government agency and its activities. The USIS is

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<sup>108</sup> Ibid.

<sup>109</sup> Stephen Barr, "OPM, In a First, Acts to Convert an Operation Into Private Firm," *Washington Post*, Apr. 14, 1996, p. A4. In 2001, USIS won the contract again with OPM in an open competition.

<sup>110</sup> Sanders and Thompson, "Reinventing Government," p. 53.

viewed as a successful exercise, one with lessons to be applied in other situations. USIS's moves into the private sector market, including extensive contracts with the casino industry, are seen as the logical progression of a generic activity: personnel investigations.

The more recent activities of USIS have raised new questions as to the appropriateness of the privatization process and the mixing of the governmental and private sectors. Exactly which assets were transferred to the USIS in the first place is not clear, but whatever they were was deemed to be worth \$28 million. The inadequacy of this figure became apparent as the Carlyle Group soon was able to purchase a substantial block of shares. The Carlyle Group is self-described as "one of the world's largest private equity firms."<sup>111</sup> The Carlyle partners and owners are, primarily, former political appointees and prominent foreign investors. The bulk of their investments are in businesses that are heavily reliant upon government contracts. Their purchase of shares in USIS was wise, timely, and fortuitous because the now private corporation underwent an incredible surge in business. In 1999 alone, the share value increased 702 percent.<sup>112</sup>

In January 2003, USIS slipped further into the "twilight zone" when a venture capital firm, Welsh, Carson, Anderson, and Stowe, purchased the stock owned by original ESOP employees for a reported \$545 million.<sup>113</sup>

This brief description of USIS, concludes this selective review of entities within the quasi government. Each category and entry has certain general characteristics worth noting as well as distinctive features. What is evident from this review is that certain basic philosophical issues are being debated, occasionally in direct terms but more often indirectly through the process of reorganization of the executive branch. This process is taking two forms: the reorganization of departments into agencies with agency-specific management laws,<sup>114</sup> and the assignment of agencies and functions, both new and existing, to entities outside the executive branch, to the quasi government discussed in this report. This process has not been without its consequences for both the institutional presidency and Congress.

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<sup>111</sup> [<http://www.thecarlylegroup.com>] (2004).

<sup>112</sup> [<http://www.usis.com>] (2003).

<sup>113</sup> Stephen Barr, "For Once-Federal Background Investigator, Privatization Leads to Its Own Kind of Check." *Washington Post*, April 24, 2003, p. B2.

<sup>114</sup> An example of the disaggregation of the management authorities in the executive branch is provided by the current exercise of excluding the Department of Defense, Department of Homeland Security, and other select agencies (e.g., Federal Aviation Administration) from most elements of Title V (Government Organization and Employees) of the U.S. Code. Today, over half of the U.S. employees are governed by agency-specific personal laws and regulations.

## Conclusion: Paradigms in Conflict

Many observers believe that the underlying attraction of the quasi government organizational option can be traced to an innate desire of organizational leadership, both governmental and private sector, to seek maximum autonomy in matters of policy and operations.<sup>115</sup> With respect to the governmental sector, however, this natural centrifugal thrust of organizational management has been historically held in check by a set of strong counter or centralizing forces. The constitutional paradigm (model) of management was, and remains, based on laws and accountability structures. The President is chief manager of the executive branch and manages through the appointment of officers, the administration of general management laws, and the budgetary process. The highest value in this public law model of management is political accountability for the exercise of governmental power.<sup>116</sup>

A unitary executive structure, coupled with hierarchical lines of authority and accountability, was a theoretical product of the founding fathers. The President was viewed as the chief manager of the administrative system. The governmental and private sector cooperated, but were kept legally distinct in the interests of protecting citizens' rights against a potentially arbitrary government.<sup>117</sup> Institutions not in the executive branch, but partaking of the attributes of governmental status were looked upon with suspicion as aberrations breaching the constitutional wall between the governmental and private sectors. These management values, however, were challenged in the 1970s by a new management theory (public choice theory) emanating from academia, and found expression in the election of political leaders, here and abroad, committed to market principles. The underlying premise of the entrepreneurial management paradigm is that the governmental and private sectors are essentially alike in the fundamentals, and thus subject to many of the same economically derived behavioral norms.<sup>118</sup> The supporters of this position promoted their values and concepts of management internationally under the rubric of New

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<sup>115</sup> "There is a persistent, universal drive in the executive establishment for freedom from managerial control and policy direction.... The desire for autonomy characterizes the operating administration and bureaus. As one observer has remarked, every agency wishes to be outside departmental structure or in the executive office of the President.... This desire for independence is an apparently innate characteristic of administrative behavior." Herbert Emmerich, *Federal Organization and Administrative Management* (University, AL: University of Alabama Press, 1971), p. 17.

<sup>116</sup> Robert S. Gilmour and Laura S. Jensen, "Reinventing Government Accountability: Public Function, Privatization and the Meaning of 'State Action,'" *Public Administration Review*, vol. 58, May/June 1998, pp. 247-58.

<sup>117</sup> Ronald C. Moe and Robert S. Gilmour, "Rediscovering Principles of Public Administration: The Neglected Foundation of Public Law," *Public Administration Review*, vol. 55, Mar./Apr. 1995, pp. 135-46.

<sup>118</sup> Barry Bozeman, ed., *Public Management: The State of the Art*, (San Francisco: Jossey-Bass, 1993). Hugh Stretton and Lionel Orchard, *Public Goods, Public Enterprise, Public Choice: Theoretical Foundations of the Contemporary Attack on Government* (New York: St. Martin's Press, 1994).

Public Management (NPM) and domestically as part of the National Performance Review (NPR).<sup>119</sup>

Skeptics of the new entrepreneurial management paradigm say the centrality of public law is displaced by the centrality of economic axioms; the focus of management, once the citizen, is now the customer; and departmental integration as the norm is replaced by agency dispersion and managerial autonomy. They see political accountability and due process being superseded by the primacy of performance and results, however defined. Critics believe that the historic wall between the governmental and private sectors is being breached not merely as a managerial convenience, but as a matter of policy; so rather than a wall, NPR's entrepreneurs are forging a web of public/private partnerships.

Given the great differences between the basic premises guiding the two schools of thought, those favoring traditional public law principles versus those favoring entrepreneurial approaches, it is not surprising that their attitudes towards the quasi government are also at odds. Those advocating entrepreneurial management tend to place high value on managerial flexibility and the setting of numerical performance standards. Many are opposed in principle to hierarchical leadership structures and emphasize the desirability of change and managerial risk-taking. This set of values with respect to governmental management makes the hybrid organization within the quasi government an attractive option.

Those favoring the public law approach to management, on the other hand, argue that the purpose of government management is to implement the laws passed by Congress, not necessarily to maximize performance or to satisfy customers. While accountability and effective performance are generally compatible objectives, in those unusual instances where these values come into conflict, they believe that the democratic value of political accountability should take precedence over the managerial value of maximizing efficiency and outcomes. Many of the public law advocates, not unexpectedly, tend to see quasi governmental entities as instruments of relatively small constituencies whose interests are promoted over the interests of the whole people as represented in their democratic institutions. Thus, they often oppose such quasi governmental hybrid entities as GSEs because they believe those who benefit (shareholders and management) are separate and apart from those who stand at risk (the taxpayers).

Supporters of performance based criteria for government management stress the need for flexibility, competition, and performance as desirable goals. The pre-eminence of these values, in their view, provides the critical elements in developing creative and successful management. In this respect, therefore, many believe that the quasi government is where much of the future lies, away from what they characterize as the stultifying impact of alleged micromanagement, both congressional and executive, general management laws (e.g., personnel regulations), and budgetary constraints. In the quasi government, some argue, management can do whatever is not forbidden to do by law, thus providing the basis for innovation and partnerships.

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<sup>119</sup> U.S. Office of the Vice President, *National Performance Review: From Red Tape to Results: Creating Government That Works Better and Costs Less* (Washington: GPO, 1993).

Accountability will be for performance, however it may be defined and measured, rather than to strict conformance to law. In the new entrepreneurial management paradigm, success, proponents say, will be measured by polling the customers on their trust and satisfaction of the delivery of governmental services.

Thus, the emergence and growth of the quasi government can be viewed as either a symptom of a decline in our democratic system of governance or as a harbinger of a new, creative management era where the principles of market behavior are harnessed for the general well-being of the nation.<sup>120</sup> One thing is for sure, however: debate between the competing management paradigms is over important issues, such as the legitimacy and utility of the quasi government, and is likely to continue into the foreseeable future.

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<sup>120</sup> Elaine Ciulla Kamark, "The End of Government As We Know It," in John D. Donahue and Joseph S. Nye, Jr., eds., *Market-Based Governance: Supply Side, Demand Side, Upside, and Downside* (Washington: Brookings Institution, 2002), pp. 227-63. Ronald C. Moe, "The Emerging Federal Quasi Government: Issues of Management and Accountability," *Public Administration Review*, vol. 61, May/June 2001, pp. 290-312.